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INVESTIGATION OF SENATOR DAVID F. DURENBERGER

OPEN SESSION HEARINGS

BEFORE THE

SELECT COMMITTEE ON ETHICS
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

PART 1 OF 7

JUNE 12, 13, 1990

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Before The

United States Senate

SELECT COMMITTEE ON ETHICS

Hearing on

THE MATTER OF

SENATOR DAVE DURENBERGER

Washington, D.C.

TUESDAY, JUNE 12, 1990

Hearing on
THE MATTER OF
SENATOR DAVE DURENBERGER

* * *

TUESDAY, JUNE 12, 1990

United States Senate
Select Committee on Ethics
Washington, D. C.

The committee met at 10:00 a.m. in Room 216 of the Hart Senate Office Building, the Honorable Howell Heflin, chairman of the committee, presiding.

Present: Senators Heflin, Rudman, Pryor, Sanford, Helms and Lott.

Staff Present: Wilson Abney, David Apol, and Victor Baird.

Senators' Staff Present: Jim Farrell, Rudman staff; Barbara Larkin, Sanford staff; and Stan Harris, Lott staff.

Also Present: Robert Bennett, Special Counsel, Frances Wetzel, and Abigail Raphael.

On behalf of Senator Durenberger: James Hamilton, Mary Albert and Karen Tomcala.

Chairman Heflin. The proceedings will come to order.

This is a duly authorized proceeding before the Senate Select Committee on Ethics pursuant to Senate Resolution 338 of the 88th Congress. This hearing will be conducted in accordance with that Resolution and the Committee's Rules of Procedure and will proceed as follows:

Each Member of the Committee will have an opportunity to make opening remarks, if he deems appropriate. The Committee's Special Counsel will make an opening statement. Senator Durenberger and his counsel may make opening statements. Special Counsel will then have an opportunity to respond.

Following the opening statements, Special Counsel will begin with the presentation of the evidence. Senator Durenberger's counsel then will have the opportunity to present evidence. And when all evidence has been presented and any closing statements have been made, then the hearings will conclude.

Today we are starting at 10:00. We will go until 12:30. Because of the fact that the National Geographic Magazine had previously scheduled a photograph of the entire Senate that was cancelled and it was rescheduled quite awhile back, it will cause us some delay; but we will endeavor to be here no later than 2:30 to 2:40 if we can to start, and we will go to 5:30 this afternoon. Normally in other days we will follow the procedure of from 9:30 to 12:00, and from 2:00 in the afternoon until 5:00 in the afternoon.

The hearings that we begin today are called adjudicatory hearings under the Senate Ethics' Rules. The hearings provide a means of presenting the evidence which will serve as the basis for the judgment of this Committee. Many expect this hearing to be conducted as a trial is conducted in a courtroom. While there are many similarities, adjudicatory hearings are not the courtroom style of adversarial proceedings with which the public may be more familiar. There is much of a difference between the same.

The hearings do provide an opportunity for evidence to be tested or disputed, and the Respondent may call and examine witnesses of his choice and cross-examine other witnesses. For this reason, the hearings are often described as "trial-like." However, there are important differences between the Committee's adjudicatory process and truly adversarial proceedings.

Some of the differences are expressed in the Committee's Rules of Procedure which provide, for example, that the Rules of Evidence are not to be applied strictly to information presented at the hearings.

Another critical difference is found in the traditional role of the Special Counsel for the Committee who is not and was never intended to be a prosecutor. His function is to assist the Committee in obtaining and reviewing all relevant and probative evidence, whether exculpatory or evidencing possible improper conduct. He must approach his task as impartially as a judge. In an adjudicatory hearing however he must present evidence and he must examine and cross-examine witnesses.

Thus, in presenting a case against a Senator, the Special Counsel cannot escape the appearance of being a prosecutor; but in carrying out his hearing functions, he must do everything he can to present the case fairly. He has many tasks, and I might say difficult tasks. He is not an independent counsel as we understand that term from the Department of Justice and as the media has frequently written about. Neither is he a special prosecutor. He is the Committee's lawyer who must in his presentation and actions fulfill his obligation to the accused and to the Committee in an objective and fair manner.

Article I, Section 5, Clause 2 of the Constitution provides that: "Each House" meaning the Congress, "may determine the rules of its proceedings, punish its Members for disorderly behavior and, with the concurrence of two-thirds, expel a Member."

In the more than 200 years since these words were written, the United States Senate has been required on a occasions to investigate the conduct of Members to determine whether that conduct has been consistent with the rules of the institution, the laws of the Nation, and the standards of conduct which the public expects and requires from those who are given the high honor of serving in this body.

In 1964, the Senate established a permanent bipartisan Committee on Standards of Conduct which in 1977 was redesignated the Select Committee on Ethics. The Committee has the responsibility to investigate allegations relating to the conduct of Senators in connection with their official duties. The Committee's jurisdiction does not extend to a Member's conduct in his or her personal life.

Under the Committee Rules, proceedings are conducted in three phases:

First, a preliminary inquiry.

Second, an initial review.

And thirdly, investigation.

Each requires a careful evaluation and a majority vote by the Committee before it can proceed further. A preliminary inquiry may be initiated when the Committee receives a complaint about possible violations of laws or Senate rules. If at the conclusion of a preliminary inquiry the Committee finds that there is reason to believe that improper conduct or a violation within its jurisdiction may have occurred, then the Committee proceeds to an initial review.

If at the conclusion of the initial review the Committee determines that there is substantial creditable evidence which provides substantial cause to believe that such improper conduct or violation may have occurred, then the Committee may conduct an investigation.

In this case, the Committee has proceeded carefully and thoughtfully through the preliminary inquiry and the initial review phases and is conducting these adjudicatory hearings as part of its investigation, the third and final step of the Committee's proceedings.

When it votes to conduct an investigation, the Committee implicitly determines that the alleged improper conduct or violation, if it occurred, would not appear to be technical, de minimus, or inadvertent. However, the Committee's decision to proceed to an investigation does not mean that any improper conduct or violation has occurred. Any such determination can only be made at the conclusion of the investigation when all of the evidence has been received.

When an investigation is completed, the Committee must file a report with the Full Senate. In that report, the Committee may recommend any disciplinary action which it deems appropriate. No such recommendation may be made by the Committee to the Senate without an opportunity for an adjudicatory hearing such as that which we begin today.

In carrying out its responsibilities as a representative of the Senate and the public, the Committee must reflect a balanced concern for the integrity of the institution and the reputation of its Members, officers, and employees. In the Committee's Rules of Procedure, this balance is struck by requiring that before a full investigation is undertaken, the Committee must first determine that there is substantial creditable evidence providing substantial cause to believe that improper conduct may have occurred.

Having discussed the Committee's general procedures, how have they been applied in this specific case? The Committee received a complaint against Senator David Durenberger from certain members of the Minnesota Bar. The complaint alleged that the Senator had violated laws and rules within the Committee's jurisdiction, in part through an arrangement he had with a publisher, Piranha Press.

The complaint was referred to the Senator for a response. Several months were required for the Senator to assemble the necessary information and submit his response. As is our duty, Vice Chairman Rudman and I jointly considered the matter and concluded that the complaint and the response should be referred to the Full Committee.

Thereafter, the Committee voted unanimously to proceed with a preliminary inquiry into the issues raised by the complaint. The next day, Senator Durenberger was advised that such an inquiry would be undertaken, and he pledged his complete cooperation. I would add that Senator Durenberger has cooperated fully with the Committee in every aspect.

At our direction, the Committee staff attorneys conducted the preliminary inquiry with the assistance of three investigators from the Office of Special Investigation of the General Accounting Office.

At this time, the Committee would like to express its thanks to the Comptroller General and the GAO for assisting the Committee, and particularly for the high level of professionalism shown by those investigators assigned to this matter.

In the course of the preliminary inquiry, staff attorneys and GAO investigators interviewed 24 witnesses who had personal knowledge relating to the allegations in the complaint, as well as 6 individuals with specialized knowledge of book publishing and the celebrity lecture business. Fifteen witness depositions were taken, and sworn affidavit testimony was obtained from others. Documents and tape recordings were provided by Senator Durenberger pursuant to the Committee's notice that such records were required. Subpoenas were issued and records were obtained from the publisher and others. Attorney-client privileges were waived by the Senator and the publisher, and records were provided by the attorneys for both parties.

The Committee staff reported the results of the preliminary inquiry and, on the basis of that report, the Committee unanimously concluded that the evidence provided reason to believe that possible violations within the Committee's jurisdiction may have occurred.

The Committee then retained Special Counsel to assist in conducting an initial review, the second phase of the Committee's proceedings. In retaining Special Counsel, the Committee sought the services of Robert Bennett because his character, competence, and even-handedness were well known from his previous representation of this Committee.

Following his August 3rd, 1989, designation as a Special Counsel, Mr. Bennett, with the able assistance of his partners and associates and investigators, conducted an extensive examination into the facts. Senator Durenberger appeared personally before the Committee and submitted further information.

Thereafter, Special Counsel's final report on the initial review into the allegations of the original complaint was submitted. The Committee voted unanimously on February the 22nd, 1990, to move to an investigation, the third and final phase of the Committee's processes.

In going to an investigation on the Piranha Press matter, the Committee determined that there was substantial creditable evidence which provided substantial cause to conclude that violations within its jurisdiction may have occurred. As the Committee's initial review of the original allegations was drawing to a close, new and unrelated allegations concerning Senator Durenberger's ownership and use of a Minneapolis condominium appeared in the Minnesota press.

Following the publication of these new allegations in December of 1989, the Committee unanimously voted to initiate a preliminary inquiry concerning the condominium matter and notified the Senator of this decision. In response to the Committee's request for documents relating to the condominium, Senator Durenberger provided several thousand pages of material. The Committee subpoenaed documents from others, as well, and requested records from the Senate Disbursing Office and the Senator Rules Committee.

After a thorough review of the documents and many witness interviews, Special Counsel submitted his final report on the preliminary inquiry into the condominium matter. The Committee then unanimously determined that there was substantial creditable evidence providing substantial cause to conclude that improper conduct may have occurred. The Committee therefore announced that the condominium matter would be the subject of an investigation and would join the Piranha Press and other matters as the subject of these adjudicatory hearings.

Since that announcement, the Committee has heard further argument from the Senator's counsel and Senator Durenberger again appeared before the Committee to provide information and respond to questions. As you can judge from this recounting, the Committee's proceedings have been both deliberate and exhaustive and, necessarily, time consuming. Several hundred witnesses have been interviewed, thousands of documents have been reviewed, and numerous briefings and Committee meetings have taken place. We have thoroughly explored the relevant evidence available to us and carefully considered each judgment which it has been our responsibility to make.

We have moved as expeditiously as fairness to the Senator and duty to the Senate and the public have allowed. We arrive now at these adjudicatory hearings where the evidence relating to Senator Durenberger's activity can be publicly produced, weighed, and judged, and where the Committee must make a decision as to whether upon all the evidence any improper conduct or any violation of law or rule has been shown by clear and convincing evidence.

In doing so, we will establish a full and complete public record which will be available for study by each Member of the Senate, for it is the Senate as a whole and not this Committee which is the final judge of the evidence.

At the conclusion of these hearings and the investigation, we will receive a written report from the Special Counsel and will in turn prepare our Committee Report to the Senate. The Committee's Report may include recommendations to the Senate for disciplinary action. If disciplinary action is recommended, the Senate will then render its judgment.

In conducting these hearings, and indeed throughout the course of the Committee's inquiry, we are and have been mindful that the reputation of a Senator who has performed valued service in this body is before us, and his future as a Member will be affected by our action.

I would like to conclude on a personal note. As a State Bar President, I participated in a number of disciplinary hearings. As Chief Justice of the Alabama Supreme Court, I presided at impeachment proceedings. In 1981, I served as the Vice Chairman of this Committee during hearings which led to Senator Harrison Williams leaving the Senate.

Sitting in judgment of one's peers is not only painful, it is inherently distasteful. However, painful as it is, the task is one which we cannot shirk. The reputations of this institution and Senator Durenberger are both at stake. The people of Minnesota who have selected David Durenberger to represent them in the United States Senate, as well as the American public, have read articles in their newspapers and seen or heard stories on television or radio which has caused great concern and consternation.

They are entitled to know what the facts are. Senator Durenberger, whose actions have been discussed in the media, is entitled to a fair hearing and a just verdict. The questions for our consideration in these hearings, and ultimately for the entire Senate are:

Has Senator Durenberger in connection with his Senate duties violated laws or Senate Rules?

Has he, either intentionally through reckless disregard, deliberate ignorance, or neglect engaged in conduct which has reflected discredit upon the Senate?

I do not know the answers to these questions. I have not and will not prejudge this case. If the evidence does not show improper action by Senator Durenberger, I will vote to clear him. But I must say this to my colleague from Minnesota:

If the evidence clearly and convincingly leads me to the conclusion that you have violated the public trust, I will not hesitate to vote appropriate sanctions. The public and the Senate expect it. The Constitution demands it.

Senator Rudman.

Vice Chairman Rudman. Thank you, Mr. Chairman. Senator Durenberger.

The Senate Select Committee on Ethics today begins hearings with respect to Senator Durenberger and his conduct relating to a Minneapolis condominium which he owned, his book and speech-making arrangements with Piranha Press, and certain other matters.

As the Chairman explained, the Committee has been through an extended process to reach this point, a process in which the Committee met 21 times, deposed numerous individuals, interviewed well over 200 others, and reviewed thousands of pages of documents. The Committee concluded that there was reason to believe that certain violations may have occurred and that such violations, if they had occurred, would be serious.

This hearing is the next stage in this process. The Select Committee on Ethics is the least known and probably the least understood committee of the United States Senate. It has no legislative jurisdiction. It rarely meets or holds hearing in public. In fact, this is the first public hearing in eight years. The Committee does not publicize itself or its actions, and as a consequence is rarely noticed by the public. Thus, an explanation of our role which is of extraordinary importance to the United States Senate and to the people of this country is in order.

As the Chairman stated, the authority, jurisdiction, and the processes of this Committee are grounded in the United States Constitution. Section 5, Clause 2 of Article I of that Constitution provide that each House may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds expel a member. Resolutions adopted by the Senate pursuant to this Clause of the Constitution created this Committee, established its jurisdiction, and Rules of Procedure, and created the rules that we enforce.

The importance of this Committee's role is enhanced by the fact that authority over internal Senate procedures is vested exclusively in the Senate under the Constitution, except to the extent that funds need to be appropriated. To ensure that the Legislature would remain independent of the Executive Branch, the Founding Fathers refused to grant the President and the Judiciary any authority with respect to the internal affairs of the Congress.

The purpose of this Committee is to protect the integrity of the Senate as an institution. The Committee is responsible for ensuring that Members of the Senate and Senate officers and employees act in accordance with the Rules of the Senate, its Code of Official Conduct, and applicable Federal law.

In carrying out this role, the Committee conducts an aggressive education program to ensure that Members and staff know what they can and cannot do, and advises individuals on a regular basis regarding ethical behavior in particular, and sometimes unique circumstances. This proactive and preventive role of the Committee is largely unknown, but it is the bulk of its workload.

Having supervised this work as Chairman and now Vice Chairman of this Committee for five-and-one-half years, I can state with full confidence that virtually every Member of this body tries to and wants to behave ethically at all times, not because there is an Ethics "police" but because they want to do the right thing.

The Committee also investigates allegations of misconduct and recommends appropriate sanctions when misconduct has occurred. To put it in common courtroom terms, this Committee, subject only to review by the Full Senate, has the delicate task of serving as prosecutor, grand jury, jury, and judge. When dealing with Members, the difficulty of this job is compounded by the fact that we are judging the behavior of our colleagues with whom we work on a daily basis and who are often our friends.

I read about how Members of the Committee dislike sitting in judgment of their colleagues. That is a statement of the obvious. Every person in this country knows that it is never pleasant to pass judgment on friends, but every Member of this Committee recognizes that the integrity of the Senate as an institution is necessary for it to function in its Constitutional role. The protection of that integrity can, under the Constitution, only be done within the Senate, and fulfilling that role is this Committee's paramount purpose.

This Committee has always acted in a nonpartisan fashion to ensure that result. That is something I never read in the press. At the same time, because of its judicial functions, the Committee must act in ways that respect the rights of individuals. This Committee has the power to destroy reputations and lives. It would be unfair to Senators and staff as individual citizens if this Committee were to spread innuendoes and rumors, comment on half the evidence, or give a daily running account of our work.

For the same reason that grand jury investigations are conducted in secrecy, this Committee conducts its inquiries in private. These hearings are in public because in this case the Committee has reached the stage which is analogous to a trial, and trials are held in public.

It is also important to recognize that the Committee cannot take action against the Senator because the press or the public think that he or she is guilty. The Committee can only act on the basis of evidence. No matter how contrary to prevailing wisdom it may be, if a Member has done nothing wrong, the Committee will act accordingly. The theory expounded by some that the Committee will, because of the current political climate, take harsh action against Senator Durenberger in order to prove it is tough is ludicrous. To do so would be unfair to the Senator and to the Senate. If the facts warrant, the Committee will recommend strong sanction; but if they do not, we will not.

Finally, since the Committee has several cases pending before it, it is important to note that each case stands alone. The allegation, facts, and evidence are different in every case. So consequently the Committee must evaluate the action of each Respondent individually. There is no other fair way to proceed.

In closing, I would like to commend Bob Bennett, the Committee's outside counsel, and his staff. His work and counsel have been excellent, and his investigation was exceptionally thorough and conducted expeditiously.

I would also like to thank Senator Durenberger. He has cooperated fully with this Committee, responded to every one of our requests for information, and even waived his attorney-client privilege.

Finally, I want to express very special appreciation to Chairman Heflin with whom I have served now for many years, and to each Member of this Committee. Every Member has spent hundreds of hours reviewing the evidence and attending the meetings, and the willingness of each Member to incur this workload on top of his normal full schedule has been necessary and vital for this Committee to carry out its crucial role.

Thank you, Mr. Chairman.

Chairman Heflin. Thank you, Senator Rudman.

Senator Pryor.

Senator Pryor. Mr. Chairman, and Mr. Vice Chairman, this is the one Committee of the United States Senate--and I think our friend Senator Durenberger knows this--this is the one Committee to which no Senator seeks membership. None of us requested this assignment.

It is also the one Committee of the United States Senate that has an equal number from each Party, three Democrats and three Republicans. That is the way it should be.

I also say that this is a day that none of us on this Committee, and I am certain no one in this room, has looked forward to. I would like to thank Senator Durenberger, Mr. Chairman, and Mr. Vice Chairman. Throughout these proceedings, throughout the statements, the depositions, the willingness of cooperation with this Committee in supplying evidence, documents, I want to thank Senator Durenberger for his cooperation.

I want to thank the Chairman and the Vice Chairman, because they have spent even more hours than the other Members of this Committee trying to see our duty as clearly as we can see that duty to this institution, to you as a colleague, and to our country as a whole. It has not been an easy task.

Mr. Chairman, I will conclude my statement by saying that I want our friend, Senator Durenberger, to know that in 10 years of this Committee I have sat here and I have heard many accusations against many Senators, some which never surfaced in the public. I can say without reservation that I have never seen a case more thoroughly gone into, more thoroughly developed, more time spent, more resources used in order to ensure that the ultimate result is going to be justice for our colleague, ultimate justice, and protection of a system and a democratic way of life.

Thank you, Mr. Chairman.

Chairman Heflin. Senator Helms.

Senator Helms. Mr. Chairman, I think everybody has made clear that this is not a pleasant assignment, nor is it one that can be evaded. I happen to be the senior Member of this Committee. I am getting to the age I am the senior member of everything.

(Laughter.)

Senator Helms. There has been discussion that I think should be taken note of this morning that perhaps the system is not the right system, and that may be true. It may be well to have the Senate consider an independent panel to do the work, the arduous work that all of us have done over a period of months. That would serve the purpose, perhaps, of expediting consideration of matters such as this.

As has been indicated, we have a number of Senators in the dock, so to speak. I have wondered about the speed or lack thereof in addressing their cases. For the record, we are working on those as well. It may be that retired federal judges or retired senators could be persuaded to serve in the capacity. It is something that the Senate should consider.

But in any case, I emerge as one Senator from the long months of consideration of this case with an appreciation of both sides. I join my colleagues in paying my respects to Bob Bennett and his staff, and I also commend the counsel for Senator Durenberger, Mr. Hamilton, whom I have known for a long time. There has been a lot of back and forth, and give and take, but in the final analysis the object of all of this is to be fair and to be firm, and I think that is what we will see.

Thank you, Mr. Chairman.

Chairman Heflin. Senator Sanford.

Senator Sanford. In the 1951 report of a Subcommittee on Ethical Standards in Government, which was a good while before this Committee was created, a subcommittee to which Senator Paul Douglas of Illinois served as chairman, there is this sentence:

"Members of the Senate and House are responsible each for his own conduct, and all collectively for the discipline they maintain in their two Houses."

The report also points out that the example of each public figure "influences the standards and conduct and the lives of people he never meets and does not know by name and, most importantly, far more than the individual public officer the integrity of a national institution influences public conduct and, by its performance, develops cynicism of trust among citizens, especially younger citizens whose attitudes and values relative to public service are being shaped."

The Senate must stand in a place of honor in its deliberations and legislation, and it must require of all Members a standard of honor in fact and in appearance in personal and official conduct if it is to be seen collectively as a place of honor.

This is no easy ambition.. Senators are employed by no entity except the constituencies of their own various states. The Senate leaders are not supervisors. Consequently, the standards must be set by consensus, including laws and rules which were brought about by previous consensus.

Likewise, the Senate must decide by consensus what constitutes wrong-doing. This is not always an easy task. There is little precedent to rely on, and there are gratefully few examples of wrong-doing to look to for guidance. There is even less precedent for deciding what sanctions should be applied. However, it is imperative that the Senate, the institution, rule and judge and exact a just penalty for actions which reflect poorly on the integrity of the Senate.

It is not an enviable assignment to examine and judge the actions of a Senator which have been called into question. It must be done. Our colleagues have trusted the Members of this Committee to preserve the honor and the appearance of honor of the United States Senate. It is a burden we might well have hoped would have been passed to other colleagues, but it has passed to us. It is our duty to maintain the honor of the United States Senate, and that is why we are here.

Chairman Heflin. Senator Lott.

Senator Lott. Thank you, Mr. Chairman.

Mr. Chairman, I do consider it an honor to serve on this Committee, although it is a dubious one. It is a very difficult job. It does have certainly very high responsibility and very serious consequences of our actions. And while none of us sought this Committee, I do feel like it is a position of honor and responsibility because of the very serious nature of our proceedings.

We have a responsibility to the American people, the Constitution, the institution of the Senate, and to the affected Senator and trying to balance all of that is very hard to do. We must be thorough, but we also must be fair.

I must say to you, Mr. Chairman and Vice Chairman Rudman, you certainly have been thoroughly fair. I have been in Congress now for some almost 20 years, and I have never seen a Committee that has been more careful to go into every detail, to make sure the investigation proceeded into every area where any questions were raised, but making sure that it was done in a fair way and that the affected Senator had a chance to respond and be involved in the process.

I must say, however, that at this juncture--because it is such a perfect opportunity to point out my concerns--that I do feel very strongly that the process needs to be reformed. Chairman Heflin has said that in the past. Former Chairman Malcolm Wallop has said that. There are so many stages you must go through, and I feel like an affected Senator is damaged by a series of slashes, inferences created by the various steps that are taken before final disposition of the matter.

That is not to say in this particular case that we would have done it any differently, but I do think that we should review this process at the earliest possible opportunity because it is obvious in these times of very serious ethics considerations that we have got to proceed very carefully.

In the spirit of those comments, though, since I think that the process has taken too long in this particular case, without directing criticism at the Chairman or the Committee, I think we should proceed to a very expeditious conclusion.

Chairman Heflin. Thank you.

Mr. Bennett.

Mr. Hamilton. Mr. Chairman, before Mr. Bennett begins, may I make a request of the Committee? After Mr. Bennett concludes, both Senator Durenberger and I intend to make opening remarks. I would hope that the Committee will sit today until both of us have concluded. I think in the interests of fairness, given the fact that there is a great deal of attention focused on this hearing in Minnesota and elsewhere, that we should be allowed to finish.

I understand that you have set the time, the ending time for today at 5:30, but if we are not through by then I hope we can go beyond that time.

Chairman Heflin. Well, Mr. Hamilton, there are other duties that the Senators have, and there are some votes that are scheduled and some other matters. We will try to accommodate you as best we can, but I would think that we will probably have to adhere to the schedule because of various other things, changes that have occurred. We had announced previously we would go from 9:30 in the morning to 5:00 o'clock, and we have tried, since there were problems about that, to make accommodations. But we will try to do the best we can.

Mr. Hamilton. Thank you, Mr. Chairman.

Chairman Heflin. Mr. Bennett.

Mr. Bennett. Mr. Chairman, Mr. Vice Chairman, Members of the Committee, Senator Durenberger, Mr. Hamilton, Mr. McKasy, ladies and gentlemen:

The questions which I would like to answer in the course of these proceedings are the following:

What was the nature of the investigation?

What findings did Special Counsel make?

And what was the evidence in support of those findings?

And what is the appropriate sanction in this case, should you Members of the Committee agree with the findings of Special Counsel?

The Chair has answered the first questions as to why we are here, so let me proceed with the second question. That is: What did this investigation consist of?

As has already been indicated, it has been exhaustive. We issued approximately 198 subpoenas to various organizations seeking their internal documents. As a result of these subpoenas, we obtained literally thousands of documents which were carefully reviewed and analyzed. Approximately 240 witnesses were contacted and were interviewed. Numerous depositions have been taken, and we have reduced to affidavit form approximately 75 to 80 of those which are of particular significance.

At the appropriate time, I will be moving into evidence the evidence that has been gathered in this investigation. So during the course of my opening, Members of the Committee, I will from time to time refer to exhibit numbers to make your task a little easier. Those affidavits can be found in Exhibit Nos. 10 through 89.

We have gathered literally 23 volumes of evidence, which is to my right. I want to make one very general observation about the evidence. While it cannot be disputed that the complaint in this case came from partisan sources, I want to assure Senator Durenberger and this Committee that Special Counsel's findings rely on evidence which is entirely independent of those partisan sources. Special Counsel's findings are based on the original sources: The groups and individuals which sponsored the Senator's appearances; the groups and individuals before whom he made those appearances; the Senator's own files; the Senator's own friends and supporters; the Senator's own handwritten notes on his documents.

What did we find? Let's talk about the findings and the evidence.

The first area I would like to discuss is what I have called the "Piranha Press arrangement." But before I give you specific findings, I think it would be of some benefit to you if I were to put that into a context.

This is the first major area where Special Counsel has found that Senator Durenberger engaged in significant and substantial wrong-doing. Between 1984 and 1986, Piranha Press published two books authored by Senator Durenberger: Neither Madmen nor Messiahs, a collection of white papers on national security issues, which was released in September of 1984; and Prescription for Change, a collection of speeches on health care issues which was released in April of 1986. Piranha Press was essentially what is called a "vanity press." It was used specifically to publish the Senator's books. It was the corporate successor to a company called "Fair Enterprises, Inc.," which in the 1960s published a photographic book of wrestling holds, and which more recently printed flyers for state fairs. This is the vehicle that Senator Durenberger selected to communicate his views on important national issues to the people of the United States.

Under the terms of his agreement with Piranha Press, Senator Durenberger made approximately 113 what he calls "promotional appearances" before various trade associations, colleges, and businesses during 1985 and 1986. Each of these groups paid Piranha Press a fee for the Senator's appearance, typically between $1000 and $5000 plus travel expenses. Piranha Press, in turn, paid the Senator $100,000 in quarterly installments over a two-year period.

Now as you know, effective in 1985, a Senator's honorarium income was limited to 30 percent of his or her Senate income, or $22,530. Effective in 1986, the limitation was raised to 40 percent, or $30,040. In addition, throughout this period, Federal law, 2 United States Code, Section 441i limited the amount of honoraria for a single appearance or event to $2000. It should be noted that in 1983, the year before the annual limit on honorarium was imposed, Senator Durenberger reported accepting $92,750 in honorarium income.

Let me give you a typical scenario of what occurred. Now there are many variations to this, most all of which will be discussed at one point or another in my opening. Typically what would happen is an organization would write the Senator inviting him to make a speech and offering him an honorarium payment. Often, in fact most often, the Senator had made honorarium appearances before these same groups in the past.

After an invitation was designated as a Piranha event, often by the Senator himself, one of the Senator's staff members would confirm the date with the group and would forward the scheduling information to Michael Mahoney, the Senator's Minnesota attorney who also acted as Piranha's agent in this transaction. In other words, Senators, as is so often the case in your own offices, when honoraria requests came in they would be handled by your staff. In this case, when they came into the staff they would then be kicked to an agent of an entity called Piranha Press, if it were to be a Piranha Press speech.

Mr. Mahoney, who acted as Piranha's agent in this transaction, would contact these folks in various ways. Sometimes the Senator's staff themselves would negotiate and confirm the amount of money that would be paid to the Senator, and usually the staff member would tell the organization seeking the honorarium event that they would expect a letter or a call from Mr. Mahoney or from some other representative of Piranha.

Mr. Mahoney's staff then would prepare a standard confirmation letter on Piranha letterhead. It is very recognizable, Members of the Committee. There is a little fish on the top of the page. The Senator would, according to the letter, would appear on the date that it was scheduled to appear and it would say right in this letter, you have requested a promotional appearance by Senator Durenberger, even though in virtually every instance that we have examined there was no request for a promotional appearance, but rather there was a request for a traditional honorarium event.

The speeches that the Senator gave on these 113 occasions were literally indistinguishable from those delivered at a traditional honorarium event. Nevertheless, when payment was made, payment was made to Piranha Press. Very often when the sponsoring organization would send the checks, they would put right on the check "honorarium." Nevertheless, these checks made their way into the bank account of Piranha Press.

Now there were of course some exceptions to this general pattern. Some of the groups objected to the proposed promotion and refused to pay Piranha Press, but insisted that the payment be made directly to the Senator. Some objected so strenuously that they withdrew the invitation entirely.

Mr. James Doherty, President of the Group Health Association of America, Inc., explained in his affidavit to Special Counsel the circumstances that led him to withdraw his invitation to Senator Durenberger to appear before his organization. Let me read it to you. This is Exhibit No. 26, and I quote:

"I received a memorandum from Piranha Press dated March 13th, 1986, concerning the arrangements for the Senator's speaking engagements. A copy of this memorandum is appended hereto as Exhibit C. By way of this memorandum I was informed that Piranha Press itself had to consent to the

Senator's speaking arrangements, and that I would hear from the Senator's attorney. The memorandum does not reference books by the Senator, and I did not understand it would be suggesting that the Senator's appearance would have anything to do with any books he may have written. I recall that the memorandum struck me as harsh, abrupt, and heavy-handed. It did not recognize that by inviting the Senator to speak on health care issues in his home State, GHAA was extending a potentially important invitation to the Senator.

"Thereafter, I received a letter dated May 2nd, 1986, from Mr. Diamond. A copy of this letter is appended hereto as Attachment E. This letter made me very angry. Mr. Diamond's letter presumed that GHAA had inquired about the Senator doing a book promotion, and that the Senator's appearance at the June 1986 GHAA conference would be a book promotion. GHAA, however, had invited the Senator to speak about health care. I believe the GHAA was being hustled by Piranha Press. As a result of my interaction with Mr. Diamond, Mr. Mahoney, and Piranha Press, I felt that it would be inappropriate for GHAA to work with Piranha Press. I spoke with a number of GHAA members and informed them of my intention to withdraw GHAA's invitation to the Senator."

On some occasions, in variation, groups were not even informed in advance of the Senator's speech that his appearance would be treated as a promotional appearance. We have affidavit after affidavit, Members of the Committee, where organizations invited the Senator to give a traditional honorarium speech. He went and he gave the speech. There was no mention of books. There was no presence of books. And only long after, indeed sometimes only when we contacted them in the course of this investigation, did they learn to their surprise that they had sponsored a book promotion event.

The first significant finding of Special Counsel based on this background is: We find that the evidence in this matter demonstrates that Senator Durenberger knowingly and actively participated in the arrangement with Piranha Press for the very purpose of circumventing the limitations on honorarium income. Moreover, the circumstances surrounding the arrangement show that it was not a good-faith venture.

Let us examine that a little further. I mentioned the wrestling holds. Let me just repeat a very relevant portion of the deposition of Mr. Diamond. Mr. Diamond is the head man at Piranha Press:

"Q Had you or any of your publishing companies ever published a book prior to this?

"A If you mean in book form, once we published a wrestling--a book on wrestling and sports in book format. Otherwise, our publications have all been magazine format or newspaper format.

"Q Okay, what year was the wrestling book? What size book are we talking about?

"A Early '70s, or late '60s. It was a book about 8-1/2 x 11, maybe 100 pages.

"Q And what did that consist of?

"A It consisted of showing different wrestling holds.

"Q How did you try to market that book?

"A That book was marketed on newsstands and at the boxing/wrestling matches."

That, Members of the Committee, is Special Counsel Exhibit No. 433. I ask you, with all due respect to Senator Durenberger, was Piranha Press selected because Senator Durenberger believed it to be the appropriate vehicle to promote books on important national issues? Or was it picked because any publisher, however inexperienced, would do because the true purpose was not to promote books but rather to sanitize honorarium payments into something else?

How is it that of all of the events, all 113 events that we have examined, not a single one of these so-called "promotions" was set up by this promoter? But each and every one was set up by Senate employees just as they had set up honorarium events in the past.

Not only was this publisher unusual, Members of the Committee, but the contract itself was in the words of an expert who provided assistance to us, "extraordinary."

Special Counsel finds that the Senator's contract with Piranha Press did not constitute a good-faith book promotion agreement. To the contrary, it varied significantly from a traditional standard book publishing agreement.

In his affidavit, Mr. Samuel Vaughan, a Senior Vice President and Editor at Random House, Inc., who assisted Special Counsel stated the following in his affidavit to us, and that is Exhibit No. 81, and I quote:

"Publishers do not customarily or traditionally pay an author to promote the author's books. Although an author may make some promotional appearances on behalf of his or her book and the publisher usually pays all or some of the travel expenses associated with such appearances, no fees or other compensation are normally paid to the author. Not all authors are asked to travel or otherwise promote their books. Promotional appearances are usually concentrated in the month or two coinciding with the release date or official publication of the book. Such appearances may be on radio or television or newspaper interviews, or at book signing appearances in book stores, but normally no fee is paid to an author for such appearances.

"Any agreement"--and this is the agreement here (indicating)--"any agreement whereby a publisher agrees to pay an author for promotional appearances over a two-year period of time would be extraordinary."

Now the evidence demonstrates that from the very outset the principal purpose of this contract with Piranha Press was not to promote books, but was to permit the Senator to earn fees for speaking engagements rather than to promote the sale of books. In an August 13th, 1984, memorandum to Mr. Mahoney, one of the Senator's lawyers--this was Mahoney the lawyer who also wore the other hat of being Piranha Press's agent. Mr. Horner, who at the time was the Senator's Administrative Assistant, stated as follows, and I quote, and this is Exhibit No. 247:

"We need some specific advice on setting up fee-earning appearances in connection with the Senator's defense book, Neither Madmen nor Messiahs. As you may recall, this book is the result of two white papers published during 1982 under the Senator's name. Gary Diamond was impressed enough with the content to try his hand at combining the papers and publishing the finished product in book form. Gary provided all funds for the publishing of the book. The book will be distributed for sale in 40-some B. Dalton Book Stores in Minnesota and in the Washington, D.C., area. Income from the sale of the books will go to Gary, although he doesn't expect to break even. His goal was to get into publishing and to help the Senator. Please advise on how we should structure speaking events connected with the promotion of the book that could potentially be income producing to the Senator. Is there an advantage to the Senator providing some of the funds for promotion? Et cetera."

Early the following month, Mr. Horner forwarded to Mr. Mahoney a draft Author-Publisher Agreement prepared by Piranha Press's counsel and it stated as follows, and I quote, and this is Exhibit No. 248:

"Attached is a copy of the agreement drafted by the attorneys for Gary Diamond, Piranha Press, publisher of Neither Madmen Nor Messiahs. The agreement is in line with verbal commitments made by the Senator and me. However, we would like a paragraph inserted in which it is made clear that the publisher or some other entity may pay the Senator a fee for a series of speeches or other promotional activity. This would be along the lines of your earlier conversations with the Senator."

Throughout the two-year term of his agreement with Piranha Press, the Senator himself personally designated certain honoraria speech invitations extended to him as a United States Senator as Piranha Press promotional events. On February 18th, 1986, Senator Durenberger received an invitation from Capitol Associates, Inc., to address a policy conference. The group offered the Senator a $2000 honorarium. Senator Durenberger himself wrote on the invitation that it was authorized as a Piranha Press event.

On February 19th, 1986, the same thing occurred with the National Association of Bond Lawyers.

And again on January 31, 1986, the same thing occurred with the National Grocers Association.

Instance after instance where folks asked for traditional honorarium events and Senator Durenberger listed them as Piranha Press events. I emphasize it was not his staff; it was the Senator himself in his own handwriting that turned these into Piranha Press events.

Now why? Special Counsel finds that as the Senator approached his honorarium income ceiling in 1985, invitations for fee-earning speeches were simply forwarded by the Senator's staff to Piranha Press to be treated as promotional appearances.

On February 15th, 1985, at Senator Durenberger's direction, his AA, Tom Horner, forwarded to Mahoney for treatment as Piranha events a set of speech invitations which as of that date had already been accepted as honorarium speeches. Let me quote that to you. It is from Exhibit No. 258, and let me underscore the significance of it. There is no agreement. People asked for honorarium events, and they are listed as traditional honorarium events. Then the agreement is signed, and here is what Exhibit No. 258 says:

"At the direction of Senator Durenberger I am forwarding to you the upcoming invitations that have been accepted on his behalf. These invitations were accepted prior to the agreement between the Senator and his publisher. Therefore, the honoraria agreed upon is $2000 or less, the limit allowed by the United States Senate."

And then these events, Members of the Committee, were no longer honorarium events but they became Piranha Press events, and Piranha Press got the money. In other words, what were honoraria events one day magically became book promotions the next, not because they were book promotions but rather because of this extraordinary agreement. This, I suggest, elevates form over substance to a degree never before seen.

The listing of the Senator's honorarium speeches created in 1985 by Anne Kelly, his scheduler, reflects that by the end of February of that year the Senator had collected $22,500 in speaker's fees, $19,500 in honoraria, and $3000 in fees paid to Mr. Mahoney. Ms. Kelly's handwritten note on this list states, and I quote: "After this amount was collected, Mahoney took over with speaking fees." And that is Exhibit No. 263. This was a book promotion for convenience.

In here affidavit, Ms. Kelly--and this is Exhibit No. 65, paragraph 6--states as follows: "I came to understand that after Senator Durenberger had almost reached his limitation on honoraria income for 1985, most speeches for which he was to receive an honorarium were to be handled as Piranha Press speeches." I don't really need to say more on that point.

In other words, Members of the Committee, the availability of honorarium income determined the nature of the event and not its true purpose or content. This is unethical. This is not honest.

On at least one occasion in 1986 a sponsoring organization was told that the Senator's speech was to be treated as a book promotion because the Senator had exceeded his honorarium income limitation for the year. I refer you to Counsel Exhibit No. 44.

A different "Kelly," Mr. Peter Kelly of the Midwest Pension Conference, described the following conversation in his affidavit in pertinent part, and I quote:

"On or about May 15th, 1986, I spoke with a staff member from the Senator's office. This staff member informed me that Senator Durenberger had exceeded his honorarium limit and, as a result, we should pay the honorarium we had agreed to pay for the Senator's appearance to his publisher. This staff member stated that they would treat this trip as a book promotion appearance. This staff member indicated that someone from the Senator's publisher would be contacting me to arrange for payment of the speaking fee to the publisher."

He then says in paragraph 6, "I was concerned that the proposed method of payment represented an attempt to evade the honorarium limitations."

Amazingly, in the course of our extensive investigation not one of the 113 promotional appearances made by the Senator under his agreement with Piranha was the result of a request to the Senator, to his staff, to Piranha, to Mr. Diamond, or to Mr. Mahoney for a book promotion. Instead, each and every one of them, as far as we can ascertain, were the result of invitations extended to the Senator directly through his United States Senate staff for purposes of an honorarium event.

I have asked the Senator through counsel to identify any book promotion events where someone called up and said, "We heard you wrote a book. We'd like to sponsor a book promotion for you." We have yet to receive any such information. In other words, each and every one of these appearances were traditional honorarium events in the minds of the sponsors and in the minds of the attendees, and only because of this gimmick with Piranha Press were honoraria payments sanitized into book promotion payments.

Now while the Senator may say that he thought they were book promotions, I would like to spend a few moments on the question of what did the sponsors think. After all, they were footing the bill. The organizations before which the Senator made promotional appearances clearly did not invite him to discuss or promote his books. Instead these organizations invited the Senator to speak because of his position as a national leader and member of the United States Senate. Describing the Senator's invitation to address the Coopers & Lybrand Annual Industry Health Care Conference in June on 1985, Mr. William McHenry, Manager for Government Relations for Coopers, stated in his affidavit as follows, and this is Exhibit 57: "Senator Durenberger was selected as a speaker because of his position as Chairman of the House Subcommittee of the Senate Finance Committee. Senator Durenberger was asked to address the topic of President Reagan's budget proposals regarding Medicare and Medicaid and the congressional responses to those proposals. He was not invited to discuss his books."

And yet the Senator treated it as a Piranha Press event. Former United States Congressman and Secretary of the United States Department of Agriculture, Bob Bergland, now the Executive Vice President and General Manager of the National Rural Electric Cooperative Association, similarly described the invitation extended to the Senator to address his organization: "Senator David Durenberger was invited to address our Cooperative Leadership Conference held in Washington, D.C. on November 18th, 1986. NRECA asked the Senator to speak because he was a member of the Subcommittee on Intergovernmental Relations of the Committee on Governmental Affairs. That subcommittee publishes a report in July of '86 entitled Governing the Heartland: Can Rural Government Survive the Farm Crisis.' That was of interest to our members. And while I do not recall the specific topics the NRECA asked the Senator to address, I know that he was invited to speak about a then current legislative subject. Senator Durenberger was not invited to promote his books."

And again the Senator treated it as a Piranha Press event. Although the Senator's promotional appearances were ostensibly to promote the sale of his book and although the Piranha Press form letter sent to the sponsoring organizations spoke about promotional literature and display of space for the books, the evidence has revealed that in only three of the 113 Piranha appearances made by the Senator were his books actually on display. Moreover, even though books were present on three occasions, it was clear that they were merely props and the events themselves were traditional honoraria events and were not book promotions.

The form letter sent by Piranha Press to the organizations which I referred to a little earlier states as follows and I quote, "We have been advised by Senator Dave Durenberger's office that you have inquired regarding a promotion appearance by Senator Durenberger." The letter also stated that the publisher would provide promotional literature to the organization. Yet, time and time again, when Special Counsel spoke to the recipients of these letters, we were told that they in fact had not inquired about a promotional appearance at all.

Richard Verville's affidavit to this committee discussing the Senator's appearance before the American Association of Nurse Anesthetists is illustrative. Mr. Verville stated and I quote, "My next contact with the publisher was a letter dated May 8th, 1986, that I received from Gary Diamond." This was the standard letter. "I recall that I -- I was somewhat angered by the demanding tone of the letter with respect to payment. The letter incorrectly stated that I had inquired about a promotional appearance by the Senator before the AANA. The letter also indicated that Piranha Press would provide promotional literature. I never received such promotional literature."

And that is Exhibit 82. And I should add, Members of the Committee, I'm just giving you examples of Exhibit numbers. In these 23 volumes there is case after case after case similar to what I am identifying today. In fact, it appears that Piranha Press never distributed any promotional literature at any of these appearances.

Now let me make something clear. The mere presence of the book, or had there been some promotional literature, would not make it a book promotion. As I suggest to you, there were three instances where books were present, but I think as you will see shortly, these were nothing more than props. Now many of the Senator's promotional appearances, and when I use that term, I mean appearances which Senator Durenberger claims were book promotions, so it was all right for him not to worry about the honoraria limits because this was not honoraria income. That is what I mean when I use this term.

Many of these appearances were at meetings and celebratory events at which other members of Congress spoke in exchange for traditional honorarium payments. In July of 1986, Senator Durenberger spoke at the Group Health Policy Forum breakfast. It was a meeting sponsored by the Equitable Life Assurance Society. The breakfast was attended by approximately ten high level officials of the Equitable and the Health Care Financing Administration. Congressman Pete Stark also addressed this breakfast. He was paid a $2,000 honorarium by the Equitable. The Equitable also paid $2,000 as an honorarium to Senator Durenberger. Mr. Stark treated it as it was, an honorarium payment. Senator Durenberger endorsed his check over to Piranha Press. He endorsed it in his writing.

February, 1986, both Senator Durenberger and Senator Dale Bumpers spoke at the American Medical Association conference called "Participation '86." Senator Bumpers reported a receipt of a $2,000 honorarium -- that is Exhibit 271 -- while Senator had his $2,000 payment made payable to Piranha Press. I suggest you look at Exhibits 107, 63, and 75. One of the organizers of the AMA conference stated in his affidavit and I quote, "I consider the payment to Piranha Press to be an honorarium payment identical in all respects to the honorarium payment to Senator Bumpers." And that is Exhibit 63.

Now I ask you Members of the Committee, wouldn't these other members of Congress be surprised to learn that what they were really attending, taking time away from the Senate duties, was a book promotion was a book promotion of Senator David Durenberger. In addition, Senator Durenberger sometimes spoke before an organization's annual meeting for several years in a row. And sometimes he would designate the speeches honorarium and other as Piranha events.

An example of that is the Senate addressed the American Protestant Health Association Forums in 1985, 1986, and 1987. And although the speeches at each and every event were similar, according to the persons who sponsored them and attended them, Piranha Press received payment for the '85 and '86 speeches, while he reported his speech for the '88 speech as an honorarium.

Now one of the things that we found is that several of the organizations strenuously objected to the Senator's efforts to convert his appearances before them into promotional appearances, and they refused to allow that appearance to be handled by Piranha Press. William Mattox, the Vice President and Director of Federal Relations for the Equitable Life Assurance Society, invited the Senator to appear before a Group Health Policy Forum breakfast meeting sponsored by the Equitable.

In his affidavit, which is Exhibit 54, he states as follows, "Sometime prior to Senator's appearance on July 29th, I spoke with a member of his Senate staff whose name I cannot recall. During that conversation, the staff member indicated that the Senator had an arrangement regarding speaking appearances with his publisher, and that arrangements for the Senator's appearance would have to be made through his publisher. I advised the staff member that I did not have any interest in any agreement between the Senator and his publisher, and that the Senator's appearance before the Equitable's Group Health Policy Forum breakfast was to be treated as a traditional honorarium event. I further explained to the Senator's staff member that the

Senator would be appearing before very high level officials of the company and HCFA, who are interested in the Senator's and Representative Pete Stark's views on health care issues. In response the staff member advised me that I would be hearing from Piranha Press and/or the Senator's lawyers regarding the Senator's arrangement with his publisher and his appearance before the Equitable. I then reiterated that this was to be an honorarium speech." And then in paragraph 4, he says, "Yes when the Equitable issued a check payable to Senator Durenberger for his appearance, he simply endorsed it to Piranha Press."

Now a further reason was, Special Counsel has concluded that these were not really promotional appearances, is the way the Senator out of his own lips kind of viewed these books, those few books that did appear in events. First of all, most of the time he never mentioned the books at all, nor did he ever mention the publisher. On occasion there would be a very brief reference to Piranha Press or to a book, and then he would go on to the business for which he was really asked to come and give a traditional honorarium address. But let's just look at a few of the Senator's remarks. We have, Members of the Committee, transcripts of a few of the speeches. Most of them were not transcribed, but the few that are have some very interesting, and I would suggest to the Committee, revealing information.

In November, 1986, a speech before the U.S. Health Corporation, a traditional honorarium event, Senator Durenberger said and I quote, "My publisher is Piranha Press, if you can believe that. I'm trying to write a real book on health policy. So this is a book, but what it really is is 44 speeches." And that is Exhibit 237. That is not much of a book promotion.

In his Piranha Press promotional appearance before the American Association of Nurse Anesthetists, Senator Durenberger said and I quote, "This book is called Prescription for Change. I don't know where it is available except in my office." That is Exhibit 205. That is some book promotion, Senator. This may explain why efforts to get the book failed.

For example, Special Counsel's investigation has revealed that, although the State Governmental Affairs Council actually wanted to distribute copies of the Senator's book to participants at his 1985 Business Issues seminar before which the Senator spoke, neither the Senator nor the publisher would make copies available to the group. Let me make it clear: he was invited to do a traditional honorarium event. The typical scenario took place. Mention is made of Piranha and these folks don't protest, as some did protest, and they say, "Great, give us some books and we will distribute them to our members."

This is what Ms. McNellis, formerly with the Council told us in her affidavit, "I had hoped and intended to set up a display table at the 1985 seminar to display Senator Durenberger's books, and possibly to have the Senator autograph copies of the book for a seminar in ten days." That is in Exhibit 58. But according to Ms. McNellis, her staff tried repeatedly to get copies of the book before the seminar, but as Ms. McNellis details in her affidavit, these efforts were unsuccessful.

She then tried to get copies after the events, hoping to distribute them to the attendees by mail. Again, however, none were forthcoming from the Senator's office. Ms. McNellis stated and I quote, "I recall being frustrated, disappointed, and somewhat confused that our original plans to distribute the Senator's books were unsuccessful." So when you want the books you can't get them.

On several occasions, a member of the Senator's staff or a representative of Piranha Press attempted to convince groups that had invited the Senator to speak to them to increase the payments offered. In other words, events were set up, there was a $2,000 honorarium limit, and it became very obvious very quickly to Special Counsel that the representatives of these groups in town knew what the limitations were, so they would just give the Senator a $2,000 offer, but efforts were made to increase these once

Piranha Press got into the scene.

Robert Odle who helped arrange the Senator's April '85 appearance before the Annual Meeting of the National Association of Chain Drugstores recalled the following events in his affidavit and I quote, "I called the Senator's scheduler, Anne Kelly, to invite the Senator and to discuss arrangements for his appearance. By letter to Senator Durenberger dated March 13th, 1985, I extended a formal invitation to the Senator and stated the Association's offer to pay an honorarium of $2,000. Ms. Kelly and I had several conversations between March 13th and March 29, 1985 regarding the honorarium to be paid the Senator. In response to Ms. Kelly's request, NACDS agreed to pay an honorarium of $5,000, $3,000 more than was originally offered." That is Exhibit 60. And that check, too, was signed over to Piranha Press.

Throughout the course of the Senator's arrangement with Piranha, numerous honorarium payments to the Senator were converted to Piranha, often without the knowledge of the group that paid the Senator for his speech. We found 26 --

Chairman Heflin. Mr. Bennett, we have been going about an hour and a half. We will take a five minute recess.

Mr. Bennett. That would be great. Thank you.

(Recess.)

Chairman Heflin. The proceedings will come to order.

Mr. Bennett, you can proceed. Mr. Bennett?

Mr. Bennett. Thank you. Members of the Committee, as I said before we broke, throughout the course of the arrangement with Piranha Press, numerous honorarium payments to the Senator were converted to payments to Piranha often without the group that paid the Senator knowing or having any knowledge as to the existence of Piranha. For example, the evident choice that 26 separate payment checks made payable to Senator Durenberger which totaled $56,750 were deposited into the Piranha Press bank account.

Four of these checks reflected the sponsoring organization had actually written on the check that it was for an honorarium, and yet nevertheless it was sent to the Piranha Press bank account. These 26 checks reflected Senator Durenberger's handwritten endorsement to Piranha Press. So what you will see if you look at the Exhibits, Exhibit 96, 104, 105, 112, 116, etc., you will see a check, an honorarium payment check essentially sometimes saying "honoraria," sometimes not, made payable directly to the Senator, and then the Senator in his own handwriting on the back endorses it over to Piranha Press.

It appears that 13 of these 26 organizations had no contact with Piranha at any time, either before of after the Senator's speech. And they were never told of the arrangement between Piranha and the Senator. In other words, these organizations sponsored and their members attended a book promotion event, and they didn't even know it.

Now let's talk a little bit about the Senator's second book. And this is particularly important, Members of the Committee, because of the timing, and I would ask you to keep that fact in mind. Prescription for Change was the Senator's second book. You will remember the first book was Neither Madmen Nor Messiahs, which is on national security policy. It is not a health care book; it is a defense oriented book. The second book is Prescription for Change, and it is in fact a health care book. And that is significant that this was the second book, and I will tell you why.

The second book, Prescription for Change, was a collection of the Senator's previously-given speeches on health care topics. It was published in April of 1986, and until that time, the only other published work was a collection of these white papers on national security and defense issues, which was Neither Madmen Nor Messiahs. Yet before April of '86, before this book was published, the Senator made more than 30 promotional appearances to health care groups. He didn't have a health care book, but he gave 30 book promotions to health care organizations.

Now what kind of a book promotion is that? Why promote a book on defense policy to groups of orthopaedic surgeons and other health care professionals who invited him to speak on important legislative issues relating to health care. Between February of 1985 and April of '86 when this Prescription for Change was published, Senator Durenberger did make two promotional appearances according to him before defense contractors, TRW and Lockheed. In other words, when this book was out, when only this book was out, he did on two occasions speak to defense groups.

Now one would think that if you were in the business of promoting books, that the place that you would promote this book is before a whole bunch of defense industry groups, not a bunch of health care books. But even these two defense companies when told that the Senator's appearance was pursuant to an arrangement for the publisher, both of these contractors refused and they issued -- they refused to issue a check payable to the publisher. And they issued the check instead to Senator Durenberger, and if you look at Exhibits 156 and 196, you will see all the Senator did, he just endorsed the check over the Piranha Press.

And again the Senator collected $100,000 over a two year period from Piranha. So really what you have is when he appears before an audience who would at least arguably might be interested in a book on intelligence matters and defense policy, they are sufficiently troubled by the arrangement that they refuse to issue a check to the publisher. Why did they refuse? It is obvious: because they knew it was an honorarium event and nothing more.

Now I think I have put my finger, Members of the Committee, on a troubling point. You say it is a book promotion and this is your justification now for taking these monies and getting this $100,000 from Piranha, but you don't have a health care book out. Now that wasn't lost on the Senator's staff. The absence of a health book at a time when the Senator was purportedly doing book promotions before health care groups was of great concern, and it is in this area, Members of the Committee, that Special Counsel obtained what at least he believes to be some of the most troubling evidence in the case.

It appears that Prescription for Change ultimately was published specifically not really to promote any book, but because of the need to justify Senator Durenberger's income from Piranha. After all, he was speaking to health groups primarily and he didn't have a health book.

In a May 1985 memo to the Senator's AA, Mr. Kelley, Mr. Mahoney, lawyer/agent for Piranha, urged that such a book be completed quickly. Here's what he said: "It is extremely important that the Senator complete a book on health matters for distribution by Piranha Press to groups that the Senator speaks to under the terms and conditions of his contract with Piranha Press."

Now listen to this, Members of the Committee: "Such a book need not be of the same caliber as the one Swanson is writing for the Senator. Approximately three weeks ago the Senator agreed that he would have a member of his staff compile a manuscript of such a book consisting of revised and edited white papers and speeches. The initial target date for delivery of a draft to the Senator for his review was May 31, 1985. I am afraid that nothing of any significance has been done on this matter. Please contact me." And that is Exhibit No. 260.

In a November 1985 memo from Jon Schroeder, the Senator's staff member who ultimately compiled the speeches which became this book, the following is observed. He is the young fellow who is now putting together this book. You talk about intent, and you talk about motive, Members of the Committee, listen to this, and I quote:

"You have asked me to review the collection of health care speeches put together by Mike Mahoney for my recommendations on how they might form the basis for a book which could be published or go to print at least by the end of the year. Here are my thoughts:

"General Reaction to the Idea: I understand and agree with the necessity of doing this because of the desirability of broadening the audience of the Senator's health speeches and enhancing his role and perception as the health Senator, and to make sure that we have a sound justification for the compensation which he is receiving from Piranha for delivering health speeches around the country. I believe the linkage between the speeches, the book, and the compensation is important in explaining 1985 compensation from Piranha. The compensation for the Senator could be described as an advance for the book. He prepared and gave the speeches as a way of generating material for the book. Some of the compensation can also be justified as advance promotion of the book which will be coming out this coming year."

And again, Members of the Committee, listen to this: "Along the way, we have to remember that this is something of a 'quick and dirty'. It has to get out within a certain time frame. It's not the ultimate Dave Durenberger piece on health issues. But again, it must not be an embarrassment and it must justify the compensation involved to the Senator." Exhibit No. 262.

Can there be any doubt that this book was little more than a pretext to sanitize what were honestly honorarium payments? Is this the kind of talk? Is this the kind of description a leader of the United States Senate should be a participant in?

Let's talk a little bit more about Piranha. The primary outcome of the Senator's arrangement with Piranha was to generate income and speakers' fees, not book sales. An examination of Piranha's bank records which we undertook show that over a two-year term of the agreement with the Senator, Piranha Press earned approximately $248,360 in fees from the Senator's speeches, and only $15,560 from the sale of books. Not surprisingly, the Senator never received any royalties from the sale of books. That evidence is in Exhibit No. 277.

This was a very profitable venture for Piranha. An examination of the bank records show that 93 percent of Piranha's income came not from the sale of books but from David Durenberger's speeches. However, it is clear that Piranha was not scheduling book promotion speeches by the Senator, for they did virtually nothing for their money. In effect, Members of the Committee, United States Senate employees paid by the taxpayers were arranging profit-making activities for Piranha Press. This occurred because traditional honoraria events which are very appropriately scheduled by your staffs were being distorted into promotions, book promotions, which didn't really have any substance to them.

In short, Members of the Committee, if you will permit me a moment of informality, this very hungry fish, Piranha Press, was allowed to engage in a feeding frenzy on responsible organizations who thought they were sponsoring traditional honorarium events. Unfortunately, the evidence shows that Senator Durenberger, a prominent United States

Senator, allowed himself and the stature of his office to be used as the bait, and he got $100,000 for his trouble.

It is clear from the evidence, Members of the Committee, that several of the Senator's campaign advisers and members of his personal staff were very troubled by the Senator's arrangement with Piranha and expressed particular concern that the arrangement at least appeared to be an effort to circumvent the limitations on honorarium income.

Frederick Graefe, an attorney friend of the Senator, testified that he did not believe the Senator's arrangement with Piranha was good, and he recommended against it to the Senator. When asked what the Senator said in response, he said he did not know but that the Senator "probably made some flip remark." That is Exhibit No. 435, pages 102 to 104.

Jimmie Powell, the Senator's Legislative Director from 1983 to 1985, stated in his affidavit to Special Counsel as follows, and I quote: "In 1985 while I was a member of Senator Durenberger's staff, I was aware of his arrangement with the publisher, Piranha Press. I was concerned by Senator Durenberger's involvement with Mr. Mahoney and Piranha Press. I was aware that Mr. Mahoney asked groups to pay in excess of the $2000 per appearance limitation honoraria for the Senator's appearances. I was concerned because groups asked to pay a fee greater than $2000 were well aware of the honorarium limit and expressed dismay at the request for higher fees. I learned of the dismay through conversations with other staff. I was also concerned about an arrangement which would have the appearance of avoiding the overall limitation on honorarium income. I was aware that the FEC had been asked for and had provided an opinion indicating that the arrangement did not violate FEC rules." That is Exhibit No. 67. I will get to that FEC opinion in just a moment.

Michael Bromberg, a friend and adviser to the Senator and fund raiser, similarly stated in his affidavit, and I quote: "At some point in 1985 I spoke with Senator Durenberger about his political future. The Senator and I had been acquaintances for many years, and I had been one of his campaign fund raisers. I told the Senator that he had a bright future which he should not cloud by his association with Piranha Press and Michael Mahoney. I informed the Senator that Mr. Mahoney antagonized people in making arrangements for the Senator's speaking engagements, and that I had heard complaints from other trade associations and lobbyists about having to pay Piranha Press for the Senator's appearances. The Senator responded that he had an opinion from the Federal Elections Commission that approved of the arrangement with the publisher. The Senator also stated that he would inquire about the complaint regarding

Mr. Mahoney. I added that, despite the technical legality of the arrangement with the publisher, the appearance of impropriety could cause difficulties in the future." And that is Exhibit No. 14.

Now let's talk about this famous FEC Opinion, the Federal Election Commission Opinion.

On December 6, 1984, Senator Durenberger's lawyer, Mr. Mahoney, received an Advisory Opinion from the Federal Election Commission that stated that, based on the information provided by Mr. Mahoney--remember, Mr. Mahoney is the lawyer/agent for Piranha--the Senator's relationship with Piranha Press was a stipendiary relationship and that the income he received from the publisher would not be considered honoraria subject to limitations. That can be found at Exhibit No. 256.

However, what is important about the Opinion is what facts the Senator's lawyers omitted in requesting the opinion from the FEC. The request for the FEC Advisory Opinion failed to disclose at least three essential facts which were known by the Senator and his lawyers at the time.

One, that the groups before which the Senator would appear would pay a fee for the service to the publisher.

Two, that those appearances would be the result of invitations extended to the Senator in his capacity as a Member of the United States Senate.

And third, that the speaking events themselves were identical in all respects to traditional honorarium events.

The Senator certainly knew that the FEC was not being given a full deck of cards because the Senator's Administrative Assistant Tom Horner was provided with a copy of the request for comment prior to its submission to the FEC, and Mr. Horner has testified that in accordance with his usual practice he would have personally reviewed this letter with the Senator.

In other words, the FEC Opinion is based on the assumption that there was in fact a good faith book promotion arrangement, and that there were book promotion events. This opinion is of absolutely no value and cannot be relied on by the Senator because, as the evidence shows, there was no good faith book promotion arrangement. These speaking events were simply not book promotions. The Senator simply did not do what the FEC Opinion authorized him to do. The only arrangement was a scheme which enabled the Senator to sanitize these honorarium payments into something else.

It is certainly clear that, had the FEC been given the true facts for this Opinion, that they never would have issued that Opinion and the Senator could not use that as a defense to the allegations here. If you just look at it logically, all any United States Senator would have to do is go get a friend, sign a piece of paper saying I want you to go promote things, and then go and do exactly what you want to do as you do every day and you could say, well, I have this piece of paper which says it is all right.

In any event, the entire basis of the opinion assumes that there was a good faith arrangement with Piranha, and that there would be legitimate book promotion events. Neither of these assumptions existed here. So in the view of Special Counsel, anyway, the evidence clearly shows that the FEC Opinion is worthless as a defense in this case, and perhaps even more troublingly it is clear that the FEC was misled into giving the opinion it gave.

The Senator has, as you have commented in your opening remarks, made a number of written and oral presentations to the Committee. He has asserted in his presentations that he relied on the advice of counsel in entering into and implementing his contract with Piranha Press. This argument, Members of the Committee, I respectfully submit to you is without merit.

As I have indicated to you, Mr. Mahoney, a primary lawyer in this, was not simply a Senator's legal adviser in these matters, he was also the very active agent of Piranha Press. He prepared letters and confirmed appearances on Piranha's behalf, and evidence shows that he billed them $24,502 for his services. These were paid by Piranha Press to the Senator's lawyer, Mr. Mahoney. This is hardly what a lawyer would call "independent legal advice."

He therefore personally benefited from the Senator's arrangement and was hardly a disinterested adviser. But, Members of the Committee, there are more fundamental reasons why the reliance-on-counsel point must fail.

As you know, Members of the Committee, from legislation you have passed, reliance-on-counsel is available as a defense in a very limited number of situations. I unfortunately experience that on a monthly basis in my private practice. You have passed laws that say, this is not a defense available in most situations. You have limited those situations to cases usually involving criminal cases, and only when a specific element of specific criminal intent is present.

This is certainly not the case here. This is not a criminal prosecution. This is an ethics inquiry. Moreover, I would point out to you that Senator Durenberger is himself a lawyer but, even more important, a United States Senator should not need a lawyer to advise him on matters of ethics. This is particularly true in the case of Senator Durenberger who was Vice Chairman of the Minnesota Ethical Practices Board at one time, and was a member of this very Committee I believe in the years of 1983 to 1985. He ought, therefore, to be able to judge for himself apart from legal niceties, whether his conduct was ethical or created the appearance of ethical impropriety.

These matters are for the Senator's own personal ethical judgments, not counsel's advice. Senator Durenberger should have been a leader in this matter, not a follower. It was his ethical compass which Special Counsel submits the evidence shows was broken, and it is unfair and unseemly to place the blame on others.

Senator Durenberger has also asserted through his counsel that his staff cleared his arrangement with Piranha Press with members of this Committee staff, and that his conduct is therefore protected in some way. The evidence available to Special Counsel demonstrates that the nature of the Senator's contract with Piranha, including the facts that the groups before which the Senator spoke would pay a fee to Piranha and that Piranha appearances would be the result of honorarium speech invitations extended to the Senator in his capacity as a Senator, were never disclosed to the Ethics Committee staff. Just as in the case of the FEC Opinion, Members of the Committee staff were given a peak, arguably--although even that is not clear--but they certainly were not given a full look.

In fact, all the staff members, all they did in this instance was to indicate in a very general way upon inquiry that if a Senator had an FEC Advisory Opinion that that would be a very strong piece of evidence supporting the propriety of what a Senator was doing. But as I said, and as I have explained, that Opinion is worthless for the reasons I have given. Simply stated, neither Senator Durenberger nor his staff ever presented to the Ethics Committee or its staff the true facts.

Now let's just take a moment to take stock of the Piranha Press matter before I move on to something else. The agreement was extraordinary. The publisher was unusual. There was no marketing plan. There was not a single book promotion set up by Piranha. There was not a single organization that asked for a book promotion. Most or many organizations didn't even know about the publisher of the book. Those few who agreed to have books couldn't get them. Promoting books to health care groups on a defense book is questionable, at best, and the book itself, from the memorandums coming right from the Senator's file, raise serious questions as to what this was all about. I refer you to the "quick and dirty" language. I refer you to the language of "this doesn't have to be of such and such caliber." And the Senator got $100,000 for his trouble, and Piranha Press got well over $200,000. I ask you. Doesn't the evidence support clearly unethical conduct in this situation?

Members of the Committee, before getting into the next major area of concern, which is the condominium matter, I would like to briefly deal with several other matters which I respectfully submit to you the evidence shows reveal several ethical violations by the Senator. These transgressions are fully documented in the exhibits, so I will be brief.

Now I don't think any one of them, in and of themselves, might justify a proceeding as important as this; but when you take them all together, what they show is that the Senator consistently engaged in a pattern of unethical conduct and showed a very serious insensitivity to the ethical demands of his office.

Let's talk about the subject of reimbursement. The evidence shows that Senator Durenberger violated the provisions of Senator Rule 34 by failing to report in his financial disclosure reports for calendar years 1985 and 1986 the acceptance of reimbursement for the necessary expenses of travel undertaken in connection with these Piranha Press events. The Rule requires a Senator to disclose this information timely; the evidence shows Senator Durenberger did not. In fact, the evidence shows that to date the Senator has failed to disclose travel reimbursements that he received from several organizations.

A campaign contribution violation: The evidence shows that the Senator converted a campaign contribution to personal use in violation of Senate Rule 38. On December 5th, 1986, Senator Durenberger addressed the Pathology Practice Association, but he was not paid an honorarium or fee for his appearance. On December 30th, 1986, the Association's Political Action Committee issued a check for $5000 made payable to "Durenberger for U.S. Senate." The Association's registered lobbyist Paul Johnson stated in his affidavit, and I quote:

"Senator Durenberger did not request an honorarium and the PPA PAC made a $5000 contribution to his re-election campaign. The PPA's check dated December 30th, 1986, clearly demonstrates that this was a campaign contribution as it is made payable to Durenberger for U.S. Senate, and has the PAC's identifying Federal Election Commission Number thereon.

However, Members of the Committee, the Senator's staff handled this event as a Piranha Press appearance, forwarding the information about the event to Michael Mahoney in October of '86. Senator Durenberger failed to report the contribution to the FEC as required by law, and failed to deposit the check with his Campaign Committee as required by federal regulations. Instead, the check was deposited without endorsement to the Piranha Press account from which Senator Durenberger was paid for his many promotional appearances.

When then have the limousine situation. The evidence shows that Senator Durenberger accepted gifts of ground transportation, essentially limousine services, in the Boston area in violation of the Senate Gifts Rule 35 during 1985 and 1986 in connection with personal travel to Concord, Massachusetts.

In 1985, Senator Durenberger began to have regular meetings for personal reasons, which I will not get into, with Dr. Armand Nicholi in Concord, Massachusetts. These meetings typically were held on Monday mornings from 8:00 o'clock in the morning until 12:00 noon. The Senator would normally fly to Boston the preceding Sunday night, would be picked up by a driver, would be taken the next morning to Concord, and the driver would typically wait from 8:00 o'clock in the morning to 12:00 o'clock when the Senator was finished seeing Dr. Nicholi. They would wait for approximately four hours.

Senator Durenberger often combined these visits to Dr. Nicholi with appearances before organizations in Boston. These organizations usually paid for the Senator's travel expenses, including limousine transportation to and from Dr. Nicholi's office in Concord, which is some 70 miles from Boston.

Senate Rule 35 prohibits a Senator from accepting directly or indirectly any gift or gifts having an aggregate value exceeding $100 during a calendar year from any person, organization, or corporation having a direct interest in legislation before the Congress. The rules define a "gift" to include transportation and reimbursement for other than necessary expenses. None of the limousine transportation--none of it--to Concord that Senator Durenberger accepted was necessary to his appearances in Boston.

On 11 occasions in 1985 and 1986, Senator Durenberger accepted limousine service to and from Concord from organizations with a direct interest in legislation. This limousine service is valued at approximately $2640. On 5 additional occasions, Senator Durenberger accepted limousine transportation in the Boston area from an organization with an interest in legislation, but the Senator did not even meet with representatives of the organization on these five dates. So in other words, Members of the Committee, he went up there supposedly to speak to organizations but, for whatever reason, never spoke to them; but still got the benefit of this relatively expensive limousine service.

The total value of the service for these five dates was $849. On five additional dates, Senator Durenberger accepted limousine service in the Boston area valued at $1287. By accepting all of these gifts of limousine service valued at approximately $4776 from an organization with an interest in legislation before the Congress, Senator

Durenberger violated Senate Rule 35.

Now as I say, in and of themselves perhaps they are not terribly significant, but when you put them together I respectfully submit what the evidence shows is a pattern of insensitivity.

Mr. Chairman, I am at a point now--I would like to know how late I can go because I am about to start the condominium matter, and I heard a buzzer. I am not sure what these buzzers all mean, but would you like to break now, or could I go to 1:00 o'clock?

Chairman Heflin. Mr. Hamilton, do you have a preference?

Mr. Hamilton. Mr. Chairman, we would prefer for Mr. Bennett to continue so we will be able to go on this afternoon and get through ourselves.

Mr. Bennett. What is the latest I can go, Senator?

Chairman Heflin. Well, we can go to 12:30. You would have about 16 minutes.

Mr. Bennett. I will not be finished in 15, so I will just have to come back.

Chairman Heflin. Well, we understand that.

Mr. Bennett. The second very major area where Special Counsel believes the evidence supports serious violations is in what has been commonly referred to as the "condominium matter." I should tell you, Senators, that the documents at least at first blush have a real patina, if I may use that word, of complexity. If I could be permitted just a moment of informality again, and maybe a touch of poetic license, I would like to use an example which I think will make an understanding of the condominium matter rather clear and rather simple.

As we were coming over today from my office, Fran Wetzel, who is my brilliant colleague and is really an Associate Special Counsel in this matter, and I were talking. I like my car much better than I like her car, but my law firm will not reimburse me for expenses on my own car. So I said to Fran, I said, Fran, I'll make a deal with you. Let's swap cars.

Now I'm not really going to give you my car, but I want you to "own" my car and I will "own" your car. But I will drive my car every day, and I will pay you a fee for letting me use what was my car but is now your car, and then with that fee you can pay the expenses of what is now your car but once was my car, and then when it is all over with, Fran, I want my car back.

That, in a nutshell, Members of the Committee, is the condominium matter. Now if I were to ask for a show of hands as to anyone in this room thinking this was all right, I think there would not be a single hand, but that is what the condominium matter was.

Let me give you a little contextual background and then perhaps bore you with some real estate terms. Following his election to the United States Senate in 1978, in February of 1979 Senator Durenberger sold his residence in Minnesota and he moved his family to McLean, Virginia. A few months later in June of '79, he purchased a one-bedroom condominium, Unit 603. Remember that number. That number is very important: 603. It is located at 1225 LaSalle Avenue in Minneapolis. He paid $48,000 for it, and he used that during his frequent travels to the City.

Now because the Senator wanted to maximize his income and minimize his expenses in 1983, he began to explore various possible dispositions of the property. The Senator wanted to find some way to shift the expenses of the condominium to someone other than himself. The way to understand this entire matter is to understand one simple fact: Senator Durenberger and his aides, and his lawyers, and his friends knew he could not claim reimbursement for staying in his own condominium.

I, as I used by my analogy, cannot get reimbursement for using my own car. So he figured if he could get someone to take over 603 and then lease it from that person, he could claim reimbursement. Now one possible means of accomplishing this goal was to exchange the properties with Robert Scherer. Roger Scherer was a friend who owned 703 right upstairs. But, like me with my car, the Senator didn't want to go into 703. He wanted to stay in 603. So they reached an understanding that they would pull a swap on paper anyway. The Senator would stay in 603, and he would simply lease back his condominium from Mr. Scherer.

It was then thought that, since he didn't really own 603, he could claim Senate reimbursement for stays in the condominium.

Now ultimately, effective July 28th, 1983, Senator Durenberger formed an investment partnership with Mr. Scherer. And the reason they formed the investment partnership, the evidence shows, is they were told that this idea of swapping would have tax implications.

So they formed this investment partnership. The Senator contributes his condo, 603, and Mr. Scherer contributes his condo, 703, to the partnership. So now the Senator doesn't own it; the partnership owns it. Senator Durenberger then rents his unit 603 from the partnership at a rate of $65 a day, claiming Senate travel reimbursement for the cost of renting this condo.

In June of 1985, Senator Durenberger placed his interest in this partnership into a qualified blind trust, and our friend Mr. Mahoney I believe is the trustee, and he deeded the property to Mr. Mahoney.

Now a time came, Members of the Committee, when Mr.

Scherer wanted out. So the partnership was terminated as of March of 1987. The Senator then sold the condominium for $52,804 to Independent Service Company, a Minnesota business owned by Paul Overgaard effective April 1, '87. Now let me tell you the significance of that. The significance of that is that once Mr. Scherer wants to get out of the partnership, the concern was that Senator Durenberger would still own 603 and, if he still owned 603 he couldn't claim Senate reimbursement for staying in 603, so there was a need, a compelling need, to get someone to replace Mr. Scherer. And the person who replaced Mr. Scherer was his friend, Paul Overgaard.

Following the sale, the Senator rented the condominium 603, the same condominium, from the company at a per diem rate of $85. The deed and the related documents evidencing this sale, I should add, have never been filed with the County Registrar of Titles and, accordingly, legal title to the property has never really been transferred to ISC.

I don't make a big point of that, because I view this, Members of the Committee, not so much as a technical legal case but rather a case of ethics.

Throughout this entire period from August 1983 to mid-November 1989, Senator Durenberger claimed and received $40,055 in Senate travel reimbursements for the costs incurred in renting 603 from the partnership and ISC. In

December of last year, in response to adverse press reports, the Senator requested that the Rules Committee examine this practice for technical compliance with the Senate travel regulations which address per diem reimbursement in the context of periods when the Senate is in session, and those when it is not.

In January the Committee, the Rules Committee, informed Senator Durenberger that the relevant travel regulation does not permit reimbursement for a Member's expenses in his or her usual place of residence in his or her home state during the adjournment period or traditional August recesses.

The Senator then repaid $11,005 in reimbursement he received for condo lodging during these recesses and adjournment periods between August '83 and November of 1989. Now it is important to understand the Rules Committee did not address the issue that is before us today and, in fairness to Senator Durenberger, its ruling does not suggest in one way or another--it has nothing to do with the ethical propriety or impropriety of what he did. That is the issue before this Committee.

I am now at a point with this contextual background where I would like to go in and discuss some of the specific evidence and discuss the nature of the relationships, particularly as these things relate to questions of motive and intent.

I would suggest, Mr. Chairman, that this would be a very appropriate time to call a recess.

Chairman Heflin. All right. We will adjourn now until 2:45.

(Whereupon, at 12:25 p.m., the hearing was recessed, to reconvene at 2:45 p.m., this same day.

AFTERNOON SESSION

(2:58 p.m.)

Chairman Heflin. The hearing will come to order.

Mr. Bennett, proceed.

Mr. Bennett. Thank you, Senator.

Before the luncheon break, I attempted to place the condominium transactions in some sort of a general context. This is an area which special counsel feels is of great importance because, like the Piranha Press arrangement, special counsel is of the view that the evidence in the condominium transaction clearly establishes very serious unethical conduct and that, as you will see shortly, the evidence is very strong on issues of both motive and intent.

Let's first of all talk a little bit about the partnership swap with Roger Scherer. Again, it was understood by the Senator and his supporters, the supporters I will identify, that the Senator could not claim reimbursement for his own condominium. So the partnership entity with Roger Scherer, a long time friend and supporter of the Senator, was the result of the Senator's efforts to structure a mechanism which would enable him to claim Senate reimbursement for overnight stays in the condominium and thereby effectively transfer to the United States Senate and the American taxpayer the cost of maintaining what was essentially his personal Minneapolis residence.

And in my simple analogy of the car and Ms. Wetzel, at least in that analogy it was the law firm that would be paying the expenses. In this case, it would be the American taxpayer.

Although the partnership purported to be effective July 28, 1983, just a few days before the Senator's first claims for Senate reimbursement for condo lodging costs, the partnership entity, in itself, in fact was not conceived until late 1983. So while July 28, '83 is a very important date because of the claims being made to the Senate, the evidence is overwhelming that they didn't even think about that partnership until long after July of 1983. Because, until that time, the Senator and Mr. Scherer intended simply to swap their respective units, 603 for 703, and not to have a joint venture of any kind.

Now, the parties' original plan, it appears, was to effect a tax free exchange of their condominiums. Since the whole purpose of this was to minimize expense to Senator Durenberger and maximize monies coming to him, they didn't want to engage in some sort of a taxable event which would cut into those monies. And they thought that this swap arrangement would suffice.

Randy Johnson, who served on the Senator's 1982 campaign staff, acknowledged this goal in a June 28, 1983 letter to the Senator. I would point out, quite obviously, that this is a letter sent to the Senator with no expectation at all that it would ever come into a proceeding such as this or into the possession of special counsel. It was a real time document.

And here's what it says. It says, "Gene Holderness and Roger Scherer have talked to me about the proposed transactions involving the condominium. I told them that I am ready to proceed with the papers as soon as you give the word. In order to minimize any possible concern about receiving reimbursement out of Senate funds for nights spent at the condominium, I believe it is important for you to list your new unit immediately and sell it within a reasonable period of time." And that's Exhibit 298.

Now, what does that mean? I think the only obvious explanation of that memorandum from Mr. Johnson is this. Is that if 703 was still in existence and there was a swap of 603 and 703, it would be so superficial that anyone looking at it would understand that there was just a scheme to get monies from the United States Senate disbursing office. So, in effect, what Mr. Johnson was doing was he was saying, you better not have two condos around, you better just have one. Perhaps there's a different explanation; I think not.

Mr. Johnson at least realized that the contemplated swap was questionable and accordingly, by that memorandum, he cautioned the Senator to dispose of his new unit quickly.

Now, between July 1983 and November 1983, Scherer and the Senator executed a number of documents in an effort to effect the swap. These included a contract of exchange of land and deeds. And these may be found in Exhibits 299, 300 and 301.

Mr. Johnson also drafted a residential lease, leasing unit 603 back to Senator Durenberger. And this is Exhibit 302.

From August 1st to December 1983, Senator Durenberger claimed over $2,000 in Senate reimbursement for the cost of renting the condo from Scherer. Yet, according to the documents produced to Special Counsel and to the Committee, but its subpoenas, he did not pay Scherer any rent during this period.

In the fall of 1983, the Senator's advisors had realized that the swap would not be tax free, as planned. So the economics of the swap now didn't appear to make very much sense. And so they suggested that a partnership mechanism be used instead.

We have located a handwritten note, and I must tell the Committee that, notwithstanding diligence on our part, we were unable to positively identify the handwriting but we believe it to be the Senator's bookkeeper's. And that states, as follows: "Per Randy Johnson, the exchange of property is not the best plan for the Senator. Mr. Langlais [that's a tax person] thinks that a limited partnership would be a much better idea." And that's Exhibit 305.

Accordingly, the Senator and Mr. Scherer ultimately formed a partnership in which each contributed their respective condominium units located in the same building, again, the Senator's being 603, Mr. Scherer's being 703, and these were listed as partnership assets.

Now, there's a problem, because when the exchange of condos, when the swap was abandoned in favor of the partnership, what happens then is the parties simply back-dated the partnership to July 1983, in order to justify the Senator's claims for and acceptance of Senate per diem reimbursements. So when the swap of July '83 doesn't work, many months later, they go into the partnership but they've got to deal, somehow, with the claims of the Senator's reimbursements, so there's plain and simple back-dating.

In a December 1983 letter to the Senator, Randy Johnson, a friend and supporter, and I believe a lawyer to the Senator, wrote as follows, and this is Exhibit 310, and I quote: "It is important that you conclude the condominium transaction in order to justify the per diem reimbursement you received during the August recess. As I mentioned to you before, I believe the straight exchange with Roger bears some risk of being disallowed by the Internal Revenue Service. I am more concerned about the partnership transaction and the allocations proposed by Dick Langlais, but he is your income tax specialist. In any event, from the standpoint of Senate rules and IRS regulations, I believe you can claim the per diem reimbursement, but the paper work on this should be completed immediately if you have not done so already. And then everything should be dated before August 1st, reflecting the oral agreement between you and Roger."

Well, members of the Committee, I would suggest, notwithstanding the advice coming from Mr. Johnson, a lawyer, Senator Durenberger is a lawyer, he's a member of this Ethics Committee, and here he's getting a memo telling him that documents should be dated before August 1st, and he's getting that direction in December of 1983.

From the outset, the parties contemplated that the Senator would lease back, from the partnership, his former condominium residence, 603, and that the obligations of the lease would be satisfied in large part through Senate reimbursements. In late 1983 and early 1984, at the Senator's direction, the partnership agreement, related real estate documents transferring the condo to the partnership, and a lease between the partnership and the Senator were drafted by his lawyers, all reflecting a July 28, 1983 date. And I direct your attention to Exhibits 311, 313 and 314.

Mr. Mahoney, the attorney, has testified to us that he was retained in December 1983, to close the transaction. And that his staff thereafter reviewed and revised the draft agreements then in existence, and drafted the real estate documents. And I direct you to Exhibit 443. In other words, Mr. Mahoney, himself, was retained to deal with documents long after the dates which the documents bear.

These documents apparently were not signed by the parties until at least early 1984. Let me identify a few of them for you.

In January 1984, Don Lattimore sent a version of the partnership agreement to Scherer for his signature, with the request that Scherer arrange for the Senator to sign it. That is Exhibit 313.

Mr. Mahoney testified that Lattimore's version was revised by his office no earlier than late December, and it was that revised agreement which ultimately was signed by the parties. And the agreement apparently was not in final form even as late as February, 1984. And I direct you to Exhibit 314.

What is the significance of this? This is evidence that there was no signed agreement in July 1983 or even in the fall of '83. But the Senator is claiming reimbursements from the Senate as if such an agreement had been duly and properly entered into and executed.

Between July 1983 and April 1984, when a partnership account was first established, Senator Durenberger apparently paid all the operating expenses of the condominium unit. What is the significance of that? Why would he be making these payments if it was not in fact his condo? It's the view of special counsel, from the evidence, is that 603 was the Senator's condo in '79, in 1983, in 1987, and it is his condo as we sit here today, except it is in the hands of Mr. Mahoney, his friend, as a trustee of this so-called blind trust.

On the basis of the original agreement with Mr. Scherer, the Senator has stated in Exhibit 315, "I have been renting 603 on a per diem basis of $65 per night since July 28, 1983. 2. I have paid mortgage real estate tax, insurance, condo fee utility and repair expenses and continue to do so. 3. I presume that Roger Scherer does the same for 703 and continues to receive income from 703 for the joint entity."

The only logical question to the Senator is, Senator, if 603 isn't yours, why are you paying these expenses?

The Senator obviously maintained an ownership interest in this condominium, even after the formation of the partnership. Just look at Exhibit 316, which certainly establishes that. And what that essentially deals with is it deals with a partnership agreement which recognizes "taxable income or loss shall be allocated between the partners." This is Exhibit 316. It's a very technical tax point which is of no particular significance to this.

Now, particularly troubling to special counsel is the apparent effort -- and I will say, apparent effort -- to conceal, from the Senate disbursing office, the Senator's interest in the partnership and, hence, the property. You always have to look at pieces of paper, not only for what they actually say, but what's between the lines.

In March 1984, the name of the partnership was changed from the "Durenberger Scherer Partnership" to the "703 60 Association." Again, I know this is complicated, but to recap, they plan a swap. It's determined that the swap won't work so it's decided that they'll have a partnership. Documents are backdated to show that the partnership exists as of July of '83. The name of this partnership is the Durenberger Scherer Partnership, and that brings me to this point.

As I say, in March of '84, the name of the partnership was changed from the "Durenberger Scherer Partnership," to the "703\603 Association." Fairly innocuous to a reader of a document, 703\603, doesn't say very much. Because they simply reflect the unit numbers of Mr. Scherer's and the Senator's respective condominium units. This change was explained in a memorandum to the Senator from his bookkeeper, Lori Krage, as follows. And let me just say, again, this is not a document prepared for this proceeding.

This is a document that, it was assumed, would never be discussed in a proceeding such as this. I'm sure it was never imagined that that would be the case. And I refer you to Exhibit 324, and I quote -- this is from the Senator's bookkeeper.

"Jean Stow will be opining and administering the partnership account. She is talking with Roger about this process, as well as with me. She will begin to issue the monthly invoices for your stays in the condo. The name of the partnership will be "703\603 Partnership," and the name will be reflected on the invoices." [These are the invoices going to the Senate.] "(I didn't think it looked good to have Durenberger-Scherer Partnership on the invoices that were being submitted to the Senate, Tom agreed.) Roger Scherer suggested this name for the partnership and, unless you object, David Steingart will process the legal paper work."

Now, what's very interesting in addition about this document, Senators, and it's dated March 21, 1984, is right next to where it says, "I didn't think it looked good to have Durenberger Scherer Partnership on the invoices that are being submitted to the Senate," right next to the word "Partnership" is a question mark and the word "Assn." obviously reflecting "Association." And we have determined that that is Senator Durenberger's notation. So Senator

Durenberger certainly saw this particular memo.

Does that not raise a question? Perhaps there is an explanation, just as there may be an explanation for a quick and dirty manuscript.

Now, cutting through some of the technicalities of the real estate documents, let's try to place ourselves, for just a moment, in the skin of Senator Durenberger and his advisors. I suppose the Senator could be thinking along these lines. I work very hard at the Senate, I have to spend a lot of time in my home town, my home State, I really need this condominium for Senate business, and if I can find some technical way to get reimbursement, it's only fair, because what I am about is the public's business.

Now, I would suggest to you that that explanation wouldn't excuse what occurred but at least I perhaps would say, I can understand the thinking. But this was not what was going on.

Throughout this entire period, the Senator and his staff were keenly aware that the Senator would need to stay in the condominium approximately 100 nights per year in order to receive enough Senate reimbursement to cover the yearly operating costs of the unit of the Partnership. Special counsel respectfully submits that if the United States Senate and the American taxpayers are to bear the costs of the Senator's lodging in Minnesota, at a minimum, the

Senator's use of the condominium should be dictated by the needs of Senate business and his constituents and not the operating costs of the property.

In May, 1984, in a letter to Scherer, the Senator's bookkeeper noted, and I refer you to Exhibit 330 and I quote, "the thing that we need to watch for is that the number of nights the Senator spends in 603 per quarter equals at least 25. Dave has suggested that you may want to reevaluate the number of nights required in the Association documents. He does not know how this number was determined, and neither does the Senator, and feels that it may put too much risk on the Senator. I have mentioned this to the Senator and will have him get in touch with you during one of his trips to Minnesota to discuss."

In an April 1985 memo to the Senator, Roger Scherer and David Steingart -- he's a young man at Mr. Mahoney's law firm -- the Partnership bookkeeper reviewed the monthly average expenses for the unit and the rental income for each and noted, "if Dave doesn't stay an average of eight and a half days per month in the condo, we will have a cash shortage." Exhibit 329.

I ask you, why should the taxpayers be paying for this?

In a July 1985 memo to the Senator, his staff bookkeeper reviewed the status of his condo reimbursements. The Senator penned the following note on this memo. "How many are reqd [required] to break even for the year?" "That's $552.50 expense per month," she replied. Now, she says, Senator, you need 102 nights at the condo to break even for '85. That leaves 67 more nights needed in the next six months. That comes out to about 12 nights a month for the rest of the year. Exhibit 332.

There's a couple of points, there's many points to be made. One interesting point, I would submit to you respectfully, is this shows Senator Durenberger is all over these documents in the minutiae. He is a great Senator but any suggestion that he was dealing with the great issues of the day and left this detail to his staff is clearly and totally rebutted by the documents. The Senator was getting into dollars and was getting into cents, and the pacing item here, the pacing item here from the evidence is not the need of the Senator to be in Minnesota, the pacing item here is how much money was needed to pay the cost of this condominium. Senator Durenberger, as well as each of you, frankly, should pay for your own cars, your own houses, your own light bills, whatever.

It would seem that the character of the Senator's use of the condominium has not changed since he purchased the property in 1979. Since that time, the Senator has maintained his personal belongings in the unit, he stayed there during his travel to Minnesota and generally had unrestricted access to the property at all times. In short, the evidence is simply overwhelming that the Senator, with the help of his friends and supporters, engaged in yet another mechanism to improve his financial position. This time, however, the money was not coming from private groups, as in the Piranha case events, but rather from the American taxpayers.

Now, let's talk about the sale to Mr. Overgaard. Because, again going back to my initial comments, it's clearly understood that if the Senator owns the condo, there's no claim for Senate reimbursement.

Mr. Scherer, he decides to get out. And so we have to do something about this 603; it can't be owned by me. Accordingly, the Senator purported to sell the unit to Mr. Overgaard, who owned a company called "Independent Service Company," effective April 1, 1987. Now why is that date important? Because it's the day before the Partnership terminates with Scherer. The Senator is making claims for Senate reimbursements, so he has to pick up the date; when one ends, the next has to begin.

So April 1, '87 is when we are told that this sale to Mr. Overgaard, a friend and supporter of his, takes place. And the Senator then continues to claim Senate reimbursement. Although the sale to Overgaard was to be effective April 1, '87, it appears from the documents produced in this matter that the Overgaard Independent Service Company was not even identified as a buyer for the condominium until the summer of 1987, several months later, several months later, several months after the purported effective date of the sale. Documents indicate that the Senator did not have an agreement with Overgaard as of June '87, much less April '87, and that evidence clearly undercuts the claim of the Senator for reimbursement.

I'm not going to go into all of the evidence. But a series of documents from June '87, marked as Exhibits 342, 343, 344, clearly reflect the following. In June of '87, the Senator originally thought that his Partnership scheme was still on going. During that month, for the first time, he focused on the fact that the Partnership had ended, and as a result, he needed a new mechanism to permit continued condominium reimbursement. He discussed several different options with his staff and advisors, including the possibility of selling the condo to some third party. Yet, never in these June 1987 documents is Mr. Overgaard or ISC ever mentioned as a possible purchaser, much less as a party who had already agreed to buy the condo or who already owned the condo.

So, while the Senator has represented that his condominium was sold to ISC, that's Overgaard's company, effective April 1, '87, the documents in evidence clearly support the position that Overgaard was not even introduced as a potential purchaser until the summer of 1987, several months after the effective date of the sale. Nevertheless, the transaction was made retroactive to April 1, '87, the date immediately following the Partnership's termination, in order to permit the Senator to claim Senate per diem reimbursement for his condominium stays back to that date.

This, Senators, I respectfully submit to you, is clearly improper.

Then, in an attempt to rewrite history, it appears that in November of '87, the Senator's office, through Mr. Mahoney, provided to Overgaard a listing of the dates on which the Senator stayed in the condo between April and November of 1987. In December of '87, ISC, Overgaard's company, then generated invoices for the Senator's stays in the condominium for that period. Based on these newly-created invoices, the Senator sought Senate reimbursement for these rental costs. The vouchers originally submitted to the disbursing office by Senator Durenberger for this period did not include condominium expenses. As originally prepared by the Senator's bookkeeper, some of these vouchers reflected condo lodging expenses, but these lodging costs were deleted, literally cross off, at a Mr. Doug Kelley's direction. And if you'll look at Exhibit 342, you will see what I'm talking about. You may also look at Exhibit 412 in support of what I am telling you.

Now, Overgaard testified that in December of '87, ISC generated rental invoices for the period from October '87, and forwarded these to the Senator's office. And that's Exhibit 445 at page 88.

The Senator's bookkeeper then prepared revised Senate travel vouch~~ers f~~or that period reflecting these new rental expenses, and gave them to the Senator for his review and signature. And that's at Exhibit 365.

The point is simple; they realized they couldn't make a claim for Senate reimbursement in real time, so they waited until the paper work was done, and then they go back and resubmit them. And they have now the paper work support that certain things existed, that just simply didn't really exist in real time.

Now, Overgaard has testified that, but for the Senator's agreement to rent the condominium from ISC, which was to be financed to a significant extent through Senate reimbursements, he would not have entered into the sales transaction. It thus appears that Senator Durenberger used the promise of Senate funds to secure personal financial gain.

Now, there's another important point here because, as I think I'm suggesting to you from the evidence, this is, was and always Senator Durenberger's condo. And the documents also show, Senators, that Senator Durenberger always had a string on this condo, and any time he wanted to pull it back, he could, just like Fran and I have this deal worked out with the car. The documents reflect the parties' agreement that Overgaard would reconvey the condominium to the Senator on demand. It therefore does not appear that Senator Durenberger in fact intended to surrender his rights to the property.

Here is an Exhibit 405, a handwritten note that Mr. Overgaard wrote the Senator. He says, "Dave, I hope these items will clear up any questions you may have. My intent is that you get it back when you want it, at the same price. I only want to help you stay clean with the Ethics question."

Is this a true arm's length, honest-to-God real estate transaction?

And that's an undated note.

The terms of the agreement with Overgaard appear to have been the subject of constant negotiation and revision throughout '88 and '89. And remember, now, we're talking April 1, '87, is when we're being told is this effective date, and we're looking at documents that they're still negotiating and revising as late as '89. Ultimately, the letter agreement reflecting the purchase, the deed, and the related real estate documents and the lease agreement, were not executed by the Senator or his representatives until 1989, almost three years after the April 1, '87 effective date of the sale. And I direct your attention to Exhibits 391 and 397.

Incidentally, by virtue of the failure to file the necessary documents with the Hennepin County Registrar of Titles in Minnesota, ISC still doesn't have legal title to the condominium. Instead, legal title to the property is in the name of the trustee of the Senator's qualified trust, and I believe Mr. Mahoney is the trustee. So it's still not owned by Mr. Overgaard.

Although the Senator received reimbursement from the Senate on a fairly regular monthly basis, we've also found that between February '88 and November '89, he made only nine lump sum rental payments to ISC, thereby effectively having the use of the Senate reimbursement funds for his own use for substantial periods of time. And that's Exhibit 407.

Now, when we cut through this I guess what we could call the patina of complexity, the point is rather simple. Senator Durenberger, in order to achieve financial benefit, engaged in a series of complex financial transactions which had one essential goal. And that was to have the United States Senate, or really the American taxpayer, pay for a residence which was really his.

The entire condominium, Senators, I think it's reasonable to conclude, is nothing more than a search by the Senator and his colleagues for loopholes. And, as is so often the case when one chases loopholes, they sometimes get caught in the loops.

And if I could just have another one of my forays into informality, as I was reading and studying these condominium documents which, on their surface, have a great deal of complexity, a thought occurred to me. I have three wonderful daughters and when they were very young, Katie, Peggy and Sarah had one of their favorite toys was a magic pad, and I'm sure you know what I'm talking about. They're always gray, for some reason, and you can write simple things or complex things with a little wooden stick you get with it, and all you have to do is lift up that transparent cover sheet and everything disappears. And the children were in absolute awe of this great mystery of the universe.

And that's what these documents are. When you stack up these condominium documents and look at them, you're awed by their complexity, but when you lift up the cover faces, it's just absolutely like that magic pad. What disappears is, substantive real estate transactions disappear. Ownership interests disappear. And what remains is what was there from the beginning, that Senator Dave Durenberger owns condominium 603 and he should pay for it, himself.

Now, in preparation for this hearing, Mr. Overgaard has submitted an affidavit to this Committee and I'm sure Mr. Hamilton will be talking a lot about it. And it's dated June 1, 1990, and it was executed on June 1, 1990. That's just 11 days ago, and he certainly knew we were going to be talking about his transaction. And in paragraph 11, he says, and I quote: "ISC's purchase of condominium No. 603 was a legitimate transaction, not a sham." Now, that's his word, and it is not my word.

However, Senators, it should be noted that during the investigation, the Committee obtained from the files of botn the Senator and Mr. Mahoney, a very interesting letter. It is a letter not written on a magic pad, Senators, but written in permanent ink. It's from Paul Overgaard to his friend, Senator Durenberger, and it's dated September 8, 1989. And it reads as follows. This, Senators, is Exhibit 394.

"Dear Dave, please excuse the handwritten letter, but I prefer to keep this totally confidential. The purpose of this letter is to ask that we terminate the condo sale at the earliest possible date. I have just closed my corporate books for the third time since we entered into the purchase agreement, and still do not have the necessary documents to prove purchase. Beginning with our fiscal year end May 31, 1987, I have paid an audit fee in excess of $3,000 annually for a certified audit which would demonstrate fiscal soundness for clients who request such information. Each of those reports has been footnoted because the auditor cannot prove ownership of the condo unit. I don't understand what you and Mahoney are accomplishing by refusing to complete the transaction. Whatever the reason, I want out. The last thing I need is to get involved in your Ethics investigation and be accused of participating in a sham transaction by which you collect per diem from the Senate on a residence you actually own. That is certainly a conclusion that could be reached as things stand now. I am also concerned about problems I could have with an audit of our corporate tax return. We are taking depreciation on the property and have nothing to show ownership. In addition, the added accounting and bookkeeping costs continue. Dave, you have expressed concern that 'your friend was ripping you off,' on the condo deal. I see it differently, of course. My purpose was to help a friend out of a financial bind and also eliminate the exposure to criticism for collecting per diem on an owned residence. Now, it is my turn to feel used. You and Mahoney must have some reason for not giving me the signed sale documents. I can't figure out the reason and obviously the two of you aren't going to let me in on those reasons. You have the cash flow information I gave you, so you must know by now that it's no big profit for

ISC. You must also be aware that you have collected more per diem than you have paid to ISC. I presume that's because of your concern that you're being overcharged. Dave, this thing has dragged along for so long that I'm just weary of the whole thing. I'll gladly settle for the return of my down payment and call it quits. There are some things just not worth hassling about and this is certainly one of them. Let me know how you want to handle the termination but please let's get it done. The simple return of my down payment and tearing up the partially completed documents would seem to be the easiest way. Sincerely, Paul."

That's from Paul Overgaard, Exhibit 394.

Now, Senators, every one of us, in our lives, sometimes use words and say things which we don't really mean. And in fairness to the Senator, they both deny it was a sham transaction. Mr. Overgaard would tell you that he was frustrated and wanted to write a letter which would catch the Senator's attention and prompt him into action and that, to say the least, his choice of words was poor.

Notwithstanding these protestations, I would like to make a number of observations which suggest that there is more truth in this letter than not.

First, this affidavit I refer to was prepared for this hearing. This letter, however, that I just read was a confidential letter between two close friends. And when he wrote that letter, Mr. Overgaard never dreamed that it would come into the hands of a special counsel.

Second, if the transaction was on the up and up, no purpose would be served by referring to it as a sham transaction. Such a description would not prompt a favorable response but would undoubtedly enrage the Senator if there was no basis of truth in it. Wouldn't Senator Durenberger's normal response, if this was a straight and honest transaction, to be outraged? However, the Senator's response was one of concern and cooperation, rather than outrage.

Third, if his allegations in that letter were baseless and were worthless, how could he imagine that this would prompt the Senator to action? If this were a totally honest and above board transaction, wouldn't the writer of such a letter be fearful that by extorting a powerful United States Senator, he might be referred to the Department of Justice?

Four, and I think very significantly, as of the date of that letter, there was no investigation by the Committee of the condominium matter but there was an investigation of the Piranha Press matter. I suggest to you, Senators, that Mr. Overgaard was very concerned that with all of the attention being focused upon Senator Durenberger and his dealings, it was only a matter of time until the condominium matter would be focused upon. And he knew full well that it was either a sham or, if it wasn't a sham, it at least was a highly questionable arrangement with very serious ethical implications.

Again, as with the other charges, the Senator claims that he has relied upon counsel. Senator Durenberger's asserted reliance on the advice of counsel, I respectfully submit to you, is not well taken for all of the reasons that I've previously mentioned to you. Moreover, an examination of the condominium documents and memoranda relating to them, clearly reveal that Senator Durenberger, as I say, was intimately involved in the transactions and focused not only on the big picture, but on the details as well.

We all know that anyone in a position of great power--and I say this with all respect to Senator Durenberger and to you, Members of the Committee, we all know that it is just a fact of life that anyone in a position of great power and influence such as each of you, you can always find someone where that will tell you what you want to hear. This is particularly true if one seeks legal advice from friends and political supporters. The entire pattern of unethical conduct, which includes back-dating and the disguising of the true nature of relationships, is clearly wrong.

The Senator, who as I say, is a former Member of this Committee himself, cannot pretend otherwise.

I have now reached what is perhaps the most important question, and I feel in a very strange and awkward position. I have great respect for this institution and I, a lawyer, have been asked as part of my responsibilities to this Committee to make a recommendation of disciplinary action.

I will do so, and I do so telling Senator Durenberger and you Members of the Committee that, as God as my Judge, there is nothing I have spent more time on than answering this question:

I have given this task a great deal of consideration. In so doing, I have reviewed prior disciplinary cases as far back as 1793. I have considered the results of the lengthy and detailed investigation which I have described here today and which can be found in document form in these exhibits. And I have carefully considered the previously made oral and written submissions of Senator Durenberger and his able counsel, Mr. Hamilton. Mr. Hamilton has been the ultimate professional in this matter, Senators, and I do wish to bring that to your attention. He has been a tough adversary, but an honorable and a professional one.

Special Counsel recommends that this Committee report to the Full Senate a Resolution denouncing Senator David Durenberger for conduct which is reprehensible and which has brought the Senate into dishonor and disrepute.

Let me explain the reasons for this recommendation. The most serious sanction which the Senate may impose is that of expulsion. Expulsions in the Senate have historically concerned cases of perceived disloyalty to the United States Government or a violation of serious criminal statutory law involving the abuse of one's official position. No Senator has been expelled since 1862.

In 1981 as Special Counsel to this Committee I did recommend that Senator Harrison Williams of New Jersey be expelled from the United States Senate. This Committee carefully reviewed the matter and reported to the Full Senate a Resolution of Expulsion. After six days of debate on the Senate Floor, Senator Williams, just prior to the

Senate vote, resigned from the Senate.

The recommendation of expulsion was based in part on a detailed factual record which showed that Senator Williams violated several federal criminal statutes, including conspiracy to defraud, bribery, conflict of interest, and interstate transportation in the aid of racketeering. Special Counsel submits to you that, while very serious, the conduct of Senator Durenberger is different from that of Senator Williams.

The essential difference is that there is insufficient evidence supporting a finding that Senator Durenberger acted with criminal intent, or that he acted with malice, or that he acted with specific intent to break the law. Because of the criminal conduct engaged in by Senator Williams, Special Counsel and this Committee thought it appropriate to recommend the removal of a Senator chosen by his constituents. Such a decision to interfere with the choice of the people, however, should only be made in the most aggravated situations.

Now by not recommending expulsion, Special Counsel is not minimizing the wrong-doing engaged in by Senator Durenberger. Counsel is simply saying that the decision to remove him from the Senate, if such a decision is to be made at all, should only be made by those who elected him to his high office.

Now while Special Counsel rejects the notion that this is an expulsion case, he equally rejects the view that this is a case only warranting admonishment, disapproval, reprimand, or any of the other sanctions that do not require action by the Full United States Senate. Such sanctions would be totally inadequate in this case.

Senator Durenberger's conduct was not inadvertent; it was not unintentional or based on mistake of fact, ignorance of the law, negligence, or misplaced reliance on others. Senator Durenberger knowingly and willfully engaged in conduct which violated statutes, rules, and Senate standards and acceptable norms of ethical conduct. His conduct was clearly and unequivocally unethical.

Counsel submits that the reprehensible conduct engaged in by Senator Durenberger warrants a sanction of denouncement by the Full United States Senate.

Now, Members of the Committee, I submit that what we call the sanction is less important than the language that the Committee uses to describe the offending conduct and the Committee's response to it.

What is important is that Senator Durenberger's conduct be fully and fairly revealed to the public through these proceedings.

What is important is that this Committee pronounce its judgment that Senator Durenberger's conduct is reprehensible and that it will not be condoned.

What is important is that this matter be put before the Full United States Senate for the imposition of its sanction of Senator Durenberger for his repeated pattern of unethical conduct.

For these reasons, Special Counsel recommends that this Committee pass a Resolution calling for the Full Senate to denounce Senator Durenberger publicly for knowingly engaging in unethical conduct which has brought dishonor and disrepute to this institution.

Further, Special Counsel notes that the Committee may refer to the appropriate Party Conference a recommendation regarding Senator Durenberger's seniority or positions of responsibility and may also consider matters such as restitution.

Now, Members of the Committee, if you were sitting as jurors in a Federal Court case and Senator Durenberger was on trial before you, you would in all likelihood not personally know the Senator or members of his family. Your total knowledge of the man and his conduct would come from this proceeding and from this proceeding alone. You would not have known him before the trial, and you would not have to deal with him afterwards.

The task of an ordinary jury is difficult, but your task is an even more difficult one. This is so because the

Constitution of the United States empowers you to judge your colleagues, and Senate Resolution 338, As Amended, makes this your solemn duty. You all know Senator Durenberger, and some of you may know members of his family. You have probably shared successes and failures. Some of you may be personally aware of some of his personal problems in his life. It is, I am sure, difficult and indeed painful to sit in judgment of your colleague, Dave Durenberger. It would be a very callous heart that did not want to reach out to him and offer him some comfort at a difficult time such as this, but I respectfully remind each of you that your loyalties here are not to Senator Durenberger.

Above you on the wall is the Seal of the United States Senate, the greatest deliberative body in the entire world. Senator Durenberger, by his unethical conduct, has tarnished that seal and has brought this institution into dishonor and disrepute. Your loyalty to this institution now summons you to denounce this Senator and his actions.

Finally and in closing, I would remind you that during the course of today's proceeding there has been an empty chair between the Members of the Committee and myself. I suggest to you that the chair is not empty, at least not symbolically, because I believe symbolically there sit the American People. They have imparted to you Senators great power over their lives and the lives of their families.

They have been wronged, and they have been short-changed by Senator Durenberger, and I respectfully submit that your duty to them is to recommend that he be denounced by the Full Senate for reprehensible conduct which has brought dishonor and disrepute to this great institution and the people it serves.

Thank you.

Chairman Heflin. I believe we will take about a five-minute recess.

(Recess.)

Chairman Heflin. Mr. Hamilton.

Mr. Hamilton. Mr. Chairman, before I start, have I got this microphone in the right place?

Chairman Heflin. I can hear you. Can everybody else? Mr. Bennett, can you hear?

Senator Pryor. Would it be permissible to bring it around the table, counsel? I cannot hear you very well.

Mr. Hamilton. Is this better, Senator Pryor?

Senator Pryor. Yes, thank you.

Mr. Hamilton. Mr. Chairman, Members of the Committee, I don't come here today to contend that Senator Durenberger did not make mistakes, because he did, as he has admitted publicly and repeatedly. I don't come here today to tell you that no rules were violated, because some were, although not to the extent that Mr. Bennett would say. And I don't intend to tell you this afternoon that no sanction at all is appropriate, because Senator Durenberger feels that some sanction is appropriate because he was inattentive and because he was unwise.

But I do want to say to you, and to say to you as forcefully as I can, that in the matters before you Senator Durenberger acted in good faith; that he had no intent to violate the rules; that he took elaborate precautions to ensure that the rules were not violated; and that he thought he was obeying the rules.

The affidavits we have submitted this weekend demonstrate this over and over again, and I hope every Committee Member will study those affidavits closely.

Now in these circumstances where there is no venal intent on Senator Durenberger's part, the severe sanction recommended by Special Counsel is simply not justified. Now I am going to elaborate over the next hour or so on all of this and give you the Senator's perspective on the facts that Mr. Bennett has discussed, but before I begin this I want to leave you with a critically important point that I hope this Committee will keep constantly in mind as I proceed.

As to the main issues before you--the Piranha Press matter and the condominium matter, and also as to certain other matters--Senator Durenberger was guided at every step by lawyers. Indeed, in these matters he relied on over a half-dozen lawyers. Also, he and his staff repeatedly sought advice from the staff of this Committee.

As to the condominium matter, his representatives sought advice from the staff of the Rules Committee. And as to the Piranha matter, he sought an opinion from the Federal Election Commission which I will refer to as the FEC.

Now this repeated searching for advice, this trying to do the right thing, may not be wholly exonerating, but it does show Senator Durenberger's good faith. It shows his attempt to stay within the rules and surely, surely this good faith is pertinent as you shape an appropriate remedy.

Now I am going to discuss the facts in some detail. As I mentioned, I am also going to submit numerous affidavits that attest to Senator Durenberger's good faith. Special counsel has submitted his own voluminous set of affidavits and depositions.

As you know, under the Committee's procedures we were not allowed to participate in his depositions or those of the Committee staff. Consequently, there are certain facts that are important to us that were not emphasized. There is not a lot in those depositions that is exculpatory, particularly regarding matters pertaining to the Senator's good faith, but our affidavits emphasize that.

However, Mr. Chairman, in the multitude of affidavits and depositions submitted by Special Counsel, there is not one assertion, not one claim that Senator Durenberger acted in bad faith or with an intent to violate laws or rules. Now Special Counsel's conclusion in this regard is his; it is not that of others involved in this matter.

Now I want to begin by focusing on the publishing arrangement with Piranha Press that earned Senator Durenberger $100,000 for a two-year period for turning over the rights of his books to Piranha Press, for his appearances for that organization, and for helping establish it as a book publishing company which was the desire of its owner, Gary Diamond.

For this $100,000, Senator Durenberger made over 100 speeches. But please keep in mind that his compensation for this was not based upon the number of speeches he made, after he made a reasonable number. After that, he was not paid more for each speech that he made.

Now the books that Senator Durenberger produced I would submit to you were legitimate books. Neither Madmen nor Messiahs has been praised by Senators Goldwater, Proxmire, Bradley, Matsunaga, and others. We have in the record letters from these individuals, from these Senators, in Exhibit Nos. 39 through 52, that will show you that as particularly regarding Madmen that this was a legitimate book. It was a serious book written by a serious man who was focusing on world problems. These books were marketed in two ways: through the B. Dalton Book Stores and also by direct mail.

Now the assertion of Special Counsel, as I understand it, is that Senator Durenberger's conduct violated both the yearly maximum limits for honoraria and the $2000 limit per appearance that a Senator may earn. And in discussing this, I would like to look at two aspects in particular.

First of all, how the contract with Piranha Press came about; and the FEC Opinion allowing the Piranha arrangement was obtained.

And secondly, how the Piranha contract was implemented.

I should say in beginning that I believe that calling Piranha Press a "vanity press" is imprecise. As I understand a vanity press, it is a press that a person who wants to publish goes to and, for a fee, for often a large fee, he gets the publishing company to publish the book so he will be able to say he is an author.

Now what happened here? Mr. Diamond approached Senator Durenberger. Mr. Diamond was impressed by two white papers on national defense that Senator Durenberger had written, and he approached Senator Durenberger and said: I would like to publish these white papers in book form, and I will pay the cost of this. One reason he was willing to do this is that he wanted to establish Piranha as a publishing company and, frankly, he saw Senator Durenberger as the vehicle to do this.

Now contrary to the implication that I believe Special Counsel left, Neither Madmen nor Messiahs was published in the summer of 1984 before the promotional arrangement with Piranha was reached. So this book was there. This book was there when Mr. Diamond and Senator Durenberger entered into this arrangement.

I would like to read in this regard from Mr. Diamond's affidavit which is Exhibit No. 3 and this is paragraph 2:

"In late 1983 or early 1984, I approached Senator Durenberger about publishing his two white papers on defense issues in book format. I was interested in both establishing a small publishing company for political and historical books, and in promoting the Senator's views with which I agreed. The white papers were edited and published under the name of Neither Madmen nor Messiahs in the fall of 1984. The book was sold in B. Dalton Bookseller Book Stores.

Now in the summer of 1984, as usual, Senator Durenberger was feeling a financial pinch. As I think you know by now, Senator Durenberger is not a wealthy man and around that time he had truly daunting expenses which we will discuss somewhat later.

Senator Durenberger asked his attorney, Mike Mahoney, if there was a legal and ethical way to make money on this book that was already out there, Neither Madmen nor Messiahs. Indeed, Mr. Horner, his Administrative Assistant, put this request in writing to Mr. Mahoney, and his letter which Mr. Bennett has read from is Exhibit No. 247.

Now Mahoney, when he gets this request, talks to his law partner, a woman named Donna Hanbery, and Ms. Hanbery did some research and reported back to Mr. Mahoney who came back to Senator Durenberger with a plan for earning a stipend for appearances, appearances to promote his book and to promote Piranha Press, a stipend that would not be considered an honorarium.

In October of 1984, Mr. Mahoney gave Senator Durenberger two written legal opinions that this arrangement would be legal under the FEC Rules. Those opinions are found in our exhibits at Exhibit No. 30 and 31. At Mr. Horner's request, Mr. Mahoney reviewed a draft contract with Mr. Diamond that someone in Mr. Diamond's organization had prepared, and that is referenced in Exhibit No. 248 that Mr. Bennett also referred to.

Now let me digress for a moment to explain the legal issue that is involved here. As I remarked a minute ago, the statute sets limits on the total amount of honoraria per year that a Member of Congress can earn, and also on the size of the individual honorarium that a Member can receive.

But the FEC rules say clear that a stipend is not an honorarium. The rules are also clear as to what a stipend is. A stipend is a payment for services on a continuing basis. An honorarium is a payment for a single event or transaction where there is no continuing relationship between the parties.

Now the difference between a stipend and an honorarium is well stated in a 1975 FEC Opinion regarding Congresswoman Barbara Jordan. There the FEC said that for an honorarium to exist, and I am quoting, "money must be accepted as a payment for a single event or transaction and under circumstances which do not imply a continuing relationship between the parties for similar services. On the other hand, an officer or employee of the Federal Government is considered to accept a stipend if the money is accepted in the form of fixed or regular compensation considered as consideration for the rendering of services."

Now, Mr. Chairman, as I am sure you know, this Committee has taken the same position. In a February 5, 1988, interpretative ruling which is Interpretative Ruling 424, this Committee said, and again I am quoting, "Payments received for providing commentaries on a continuing basis which the FEC would consider a stipend constitute stipends rather than honoraria for the purpose of the statute which this Committee oversees," which is the statute that places a total yearly limitation on the amount of honoraria.

If a Senator is paid a salary for services on a continuing basis, that salary does not go into the honorarium column. A number of prominent Senators have legitimately availed themselves of this rule, including Senators Dole, Simpson, Mathias, Kennedy, Biden, Proxmire, Moynihan, and the list goes on.

Now even though Mr. Mahoney had advised in writing that payments from Piranha would be a stipend and not honoraria, he said, I'm not sure, Senator Durenberger. Why don't we go and consult the FEC. Senator Durenberger agreed that that should be done, and he left it up to Mr. Mahoney to do this correctly.

Mahoney and his partner, Hanbery, put in a request to the FEC in a letter providing the facts they thought are relevant to the issue. The letter referenced this contract between the Senator and Mr. Diamond which indicated that the groups that the Senator spoke to would be charged a fee. And the letter said--and this letter is Exhibit No. 38--the letter said to the FEC: If you need more facts, ask us.

The FEC responded in a letter, which is Exhibit No. 34. That letter said, thank you for your letter. If we need more information, we'll ask you. And indeed the FEC regulations which we have cited to you require the FEC, if an application is incomplete in any material way, to ask for the information that it needs.

Now as Ms. Hanbery testified in deposition, the idea here was somewhat unusual. It was somewhat innovative. They could assume, Mahoney and Hanbery, that the FEC would ask them if they needed more information. The FEC was told in this letter what a different arrangement this was. The FEC was told expressly that Senator Durenberger was going to be paid by Piranha Press for two years for making appearances, but apparently the FEC didn't think that it needed any more information because it never asked Mr. Mahoney or Ms. Hanbery for any additional information.

Now in December, December 6, 1984, the FEC issues its opinion. The opinion said that payments for promotional appearances by Senator Durenberger would be a stipend for continuing services and not honoraria. Let me read from this opinion, Mr. Chairman:

"The Commission also notes that the regulations exclude from the definition of 'honorarium' the term 'stipend.' A stipend is defined as a payment for services on a continuing basis. The Commission concludes that the arrangement you have described whereby the publisher will pay Senator Durenberger in quarterly installments over a two-year period for promotional appearances creates a stipendiary relationship. Accordingly, payments made to Senator Durenberger under this agreement would not be viewed as honorarium and therefore would not be subject to limitation under the statute."

It was interesting to me, Mr. Chairman, that Mr. Bennett this morning did not mention the FEC's opinion until, by my watch, 11:59. We think this is a central document in this whole proceeding.

Now one criticism that Mr. Bennett has made that others have made was that the FEC was not told that Piranha would charge a fee to the groups that the Senator spoke to. Now as I noted, the request for an advisory opinion specifically referenced the contract which revealed that these groups would be charged a fee. Moreover, the prior opinions regarding stipendiary relationships have focused on the relationship between the payor and the Member. They have not focused on how the payor, in this case Piranha, got its funds. That is one reason that Mr. Mahoney did not mention this in his letter to the FEC.

In any event, in an article on May 21, 1986, in the St. Paul Pioneer Press, after discussing that fees were charged the sponsoring groups, the following passage appears, and I'm quoting now: "Told of the nature of the promotions, FEC Assistant Press Officer Sharon Schneider said," and now we're quoting Sharon Schneider, "'I don't think that legally changes the fact that he is getting a stipend (a fixed amount) and not an honoraria. He is performing services for the company and has a contract with the publisher.'" This was a quote from an official at the FEC.

Now despite the massive publicity--and I will tell you in Minnesota it has been massive--despite this publicity, the FEC has never contacted Senator Durenberger about this matter, has never begun an investigation into this matter, and it has never revoked its advisory opinion.

So, Mr. Chairman, I submit that Senator Durenberger cannot be faulted for the way this opinion was obtained. Moreover, Mr. Chairman, not only did Senator Durenberger seek the advice of the FEC and his lawyer's advice, he sought advice from the staff of this Committee. The Senator approached a staff member named Clendon Lee about the arrangement in 1984, and in early 1986 his Administrative Assistant, Doug Kelley, sought out another staff member whose name is William Canfield. The advice that Mr. Kelley received is reflected in Mr. Kelley's February 25, 1986, memo to Senator Durenberger which is our Exhibit No. 39.

Now let me read a portion of this memo because I think it is quite revealing, and I'm quoting: "I visited with Bill Canfield, staff attorney, Senate Select Committee on Ethics, today concerning our disclosure of outside income. In informed Mr. Canfield that at the time of the inception of the Piranha Press, you had had a conversation with Clendon Lee and had run the details of Piranha Press by him for his approval. Canfield remembered the conversation you had had with Lee because Lee had discussed the issue with Canfield and other staff lawyers at the time. Lee, as you told me, found no problems with the arrangement from the Ethics Committee's viewpoint. Canfield was also aware that the Federal Election Commission had subsequently issued an opinion stating that the income from Piranha Press would be considered to be a stipend rather than honoraria. I asked Canfield whether any follow-up should be made to the Clendon Lee conversation or whether we should request a formal opinion from the Ethics Committee. Canfield informed me that an opinion would be an unnecessary redundancy because the FEC's determination that the income would be stipendiary in nature was dispositive of the issue. Canfield said the FEC was the proper forum to interpret the Federal Campaign Practices Act, and that the only concern the Ethics Committee had was whether or not the income derived from the arrangement would be reportable as required by Title II, United States Code, Section 441(1)."

Now in a handwritten note on this memo, Mr. Kelley added that, and I'm quoting again, "6/13/88"--in other words, June 13, '88--"read above memo to BC"--that is, Bill Canfield--"for accuracy. He said it accurately reflected our conversations."

Mr. Chairman, Mr. Kelley is a former Assistant United

States Attorney. He is now running for Governor of Minnesota. He is an honorable man. His contemporaneous memo shows his good faith, and it shows Senator Durenberger's good faith in the Piranha Press matter.

Now candidly, Mr. Chairman, as Senator Durenberger has already admitted, there were problems in the implementation of the Piranha Press contract. But a basic question that you must focus on is: Do the facts here show some type of venal intent, some type of intent to unlawfully circumvent the honorarium rules? I don't think so, Mr. Chairman, and I don't think that a fair analysis of the facts will show a venal intent.

Now Special Counsel's evidence, and indeed his talk this morning, indicate that two aspects of this matter trouble the Committee, two aspects of the implementation.

First, the fact that requests for honoraria speeches were funneled to Piranha and the appearances then became Piranha appearances. That happened. That happened.

Secondly, that there was little effort, at least in some instances, to promote the books by Senator Durenberger and others. Now I suppose that somebody might look at this conduct and say, hey, this is part of some grand conspiracy to unlawfully circumvent the honoraria rules, a conspiracy that included numerous participants: Senator Durenberger, his lawyers Mahoney and Hanbery, his publisher Mr. Diamond, his aides Tom Horner, Doug Kelley, Jody Mathison, Anne Kelly, and others, but I suggest to you Mr. Chairman that a far better explanation is that from the beginning all involved believed that what was occurring was proper.

Now Senator Durenberger's Administrative Assistant Tom Horner testified that early on in this process he asked Mr. Mahoney if the FEC opinion was still valid, given the fact that (1) groups are being charged fees; and (2) that requests for honoraria appearances were being sent to Piranha and the appearances then became Piranha appearances.

Mr. Horner has testified under oath that Mahoney said that all the necessary information was being given--had been given the FEC, and that the FEC opinion was still controlling. Horner says this in his deposition, and Horner says this in his affidavit that we have submitted in the last few days to the Committee.

Now Mr. Mahoney of course who is in the middle of the implementation of the Piranha Press contract was acting both as Senator Durenberger's lawyer and as Piranha's agent, as Mr. Bennett said. Mr. Mahoney was arranging for the appearances. He was communicating and negotiating with groups as to fees. In short, he was the principal organizer of all of this. Senator Durenberger, I submit, since Mr. Mahoney was his lawyer, was entitled to rely on him to ensure that this matter was being handled properly.

Now Mr. Bennett makes the point that Senator Durenberger was a--is a lawyer and didn't need lawyers to help him out in these things but, gentlemen, I expect from your own experience you know how much as to legal matters you rely on lawyers no your staff or other staff members, and maybe even outside lawyers. Senators are busy people and they do rely on others as of necessity.

Now a most significant document is a letter that Mr. Bennett read to you, which is a February 15, 1985, letter from Tom Horner to Mike Mahoney. I want to read portions of this again to you, because I put a somewhat different interpretation on what this document means. In this document, in this letter, Mr. Horner forwarded to Mr. Mahoney Piranha invitations--invitations for honoraria speeches to be turned in to Piranha appearances. This letter is Exhibit No. 38 in the exhibits we have submitted to you. Mr. Horner writes:

"At the direction of Senator Durenberger, I am forwarding to you the upcoming invitations that have been accepted on his behalf. These invitations were accepted prior to the agreement between the Senator and his publisher. Therefore, the honoraria agreed upon is $2000 or less, the limit allowed by the U.S. Senate. Each invitation is marked with the date of the event and the honoraria."

Now skipping a line or two:

"In accordance with the contract between the Senator and his publisher, it is my understanding that Curtin, Mahoney, and Kearns, acting as an agent of the publisher, will negotiate the fee, collect the fee, and arrange payment by the publisher to the Senator."

Now the way I read this letter, Mr. Chairman, is that it is clear that everybody thought that these transfers were proper. There was no attempt to hide what was going on. Indeed, there would be no way to hide what was going on because these groups already knew their honoraria request had been accepted. So my conclusion is that everyone thought that this was proper, and it is completely certain that Mr. Mahoney the lawyer didn't tell Senator Durenberger or Mr. Horner or anybody else that this was not proper.

Now I take it from listening to Mr. Bennett that he thinks that these transfers were wrong, but there is no FEC or Senate rule or ruling that prohibits this. Certainly Mr. Bennett doesn't cite any. Moreover, the requesting groups could decline to deal with Piranha if they wanted to, and indeed some did. Most did not, but a few did. No one was twisting their arm in this regard. They could back out.

In any event, I think it is obvious that these transfers were done in good faith and without improper intent. The affidavits and the deposition excerpts we have submitted show this good faith. And to conclude otherwise would be to find that there was a sweeping conspiracy that involved a great many good, respectable people. The evidence, Mr. Chairman, does not allow this conclusion.

Now it is also clear that early on Diamond and Mahoney did not insist on much promotion by Senator Durenberger or others. Mr. Diamond usually did not supply the promotional materials that he said he would supply in his letters to these various groups. When groups objected to Mahoney and to Diamond about the Senator's speech being promotional in nature, they didn't insist on this particular aspect of it. And no one pushed--for two years, no one pushed Senator Durenberger to make his speeches more promotional. In short, the evidence is that nobody considered this to be a very important element.

Now maybe because the Senator was making at least some efforts to promote his books--for example, whenever he spoke in the District, he instructed his aide always to have a book along. There is one affidavit we submitted where the aide unfortunately showed up without a book, and he was dispatched back to the Hill to get it so the Senator would have a copy of his book with him at this particular appearance.

Maybe also nobody thought that this was particularly important because Senator Durenberger was promoting the books and the publishers by speaking well, which he always did. And maybe no one thought it was particularly important because the Senator was helping Mr. Diamond build a publishing firm by these appearances, and that was a very significant part of this continuing service that Senator Durenberger was providing for Mr. Diamond.

Now your Special Counsel has spent a great deal of time and a great deal of effort looking at the promotional aspects of Senator Durenberger's appearances. I think he did this because the FEC ruled that a fee for promotional appearances would be a stipend and would not be an honoraria. This is what it dealt with in its advisory opinion.

Now this raises a legal issue that I have discussed with the Committee and I wish to talk about again. Senator Durenberger did not need an advisory opinion to avail himself of the rule that distinguishes stipends from honoraria. What an advisory opinion does it to give a Member a safe harbor, an immunity from attack under certain statutes so long as the Senator stays within the limits of the conduct described in the advisory opinion.

If a Member engages in other or different conduct, this doesn't necessarily mean that he has violated the rule, or that the payment he receives is not a stipend. It only means that he can't rely on the advisory opinion for protection. Even if the conduct is different, the payment is still a stipend if it is for a continuing service.

Now the the FEC told Senator Durenberger that payments for book promotions would be a stipend for continuing services and not honoraria. If Senator Durenberger's appearances were in fact not book promotions, there is no statutory safe harbor. But the payment is nonetheless a stipend if it was for some type of continuing service.

Now however you want to characterize Senator Durenberger's conduct, you must conclude that Piranha paid him for continuing services. That is, for making appearances before various groups for which Piranha was paid a fee, and for helping establish Piranha as a book publishing company, which was Gary Diamond's dream, his principal interest, as is made clear over and over again by his deposition and also by the passage from his affidavit that I just read to you.

Under the rule, Piranha could pay the Senator for various types of continuing services without violating the honoraria rule. Piranha could pay him for a series of inspirational speeches, for example, or Piranha could pay him for a series of remarks on various political topics, such as Senators Simpson and Kennedy make several days a week on the radio.

As I said, Special Counsel has amassed much evidence to show that the speeches were not promotions. But, at most, this shows that the appearances were different from that described in the FEC opinion and, thus, Senator Durenberger has no statutory immunity. But the evidence does not show that Senator Durenberger was not performing a continuing service for Piranha, because he clearly was. And maybe this is part of the reason that, despite all this extensive publicity, the FEC has never contacted Senator Durenberger. In the four years that have elapsed since all this came out, there has not been one peep out of the FEC directed to Senator Durenberger.

Now, the Committee may not like this rule. The Committee may think that it creates a gigantic exception to the honoraria limitations. And, frankly, you may be right about this. But, as long as this rule is on the books, a Senator should not be sanctioned if his conduct is permitted by it. That is a proposition of basic fairness.

Mr. Chairman, I recognize that on several occasions, Piranha received appearances where the groups didn't know beforehand that these appearances were Piranha appearances. And I won't deny that there was some sloppiness in the administration of this arrangement. Part of the problem may be Mr. Mahoney's, a part of it may be attributable to the fact that, for a period of months in 1985, Senator Durenberger didn't have an AA. Part of it may be attributable to other staff problems that are discussed in the affidavits that we have submitted.

In any event, certainly in most instances, Senator Durenberger did not know that the groups he spoke to did not know it was a Piranha speech. It's also true that some checks that were sent in that were designated as honoraria checks, checks that came into the Senator's office, were transferred up to Piranha and deposited in Piranha's bank account.

Well, Mr. Chairman, I think this can best be viewed as an attempt to put the money into the account of the party that was owed it. Senator Durenberger had contractual obligations to Piranha to see that Piranha was paid. It couldn't have taken this money and put it in his own bank account. That would have been an improper conversion. So what did he do? He endorsed some of these checks over and sent them up to Piranha to put in the proper bank account.

As I've said before, whenever one thinks of the propriety of the way this contract was implemented, it's hard to conclude that it was done with venal motives or as part of some grand conspiracy. The evidence doesn't clearly and convincingly show that. And that, of course, is the burden of proof that you must apply.

Rather, what we have here is open public conduct, conduct that was done after receiving the advice from lawyers, from the FEC, and from the staff of this committee. There was no attempt by Senator Durenberger to hide what was going on. Indeed, Senator Durenberger openly discussed his arrangement with other of his Senate colleagues who were writing books, because he thought he had found a legitimate way to supplement his income, a way that others could use.

As I've said before, I'm sure there are members of the United States Senate that are glad they didn't follow his lead in this regard.

In sum, Mr. Chairman, I submit what we have here are just mistakes and sloppiness, not intentional impropriety. Indeed, given the fact that the Senator was performing a continuing service for Piranha, it's not at all clear, in fact, I would submit that the rule was not violated. It's also clear that the $2,000 limit rule was not violated. Senator Durenberger received a $100,000 for over a hundred appearances. And that comes out to less than $1,000 an appearance.

In these circumstances, Mr. Chairman, I submit that a harsh sanction, such as denouncement, is simply not appropriate.

And, Mr. Chairman, before I leave the Piranha matter, there are two other related charges that I would like to consider. And I do this not to extend our time this afternoon, but I do want to be thorough.

One charge asserts that reimbursements for Piranha travel, travel to the groups that the Senator spoke to, were not reported on the financial disclosure forms on a timely basis. The other charge contends that a check made out to the campaign committee was wrongly converted to a Piranha bank account. As I'm going to explain, neither one of these matters warrants any sanction by this Committee.

Now, as to the reporting charge, all income from Piranha was duly reported. That is, the $100,000 that the Senator received from Piranha was reported on his financial disclosure forms. But the Senator did not initially report travel expenses paid by groups that sponsored the Piranha appearances. Now, the evidence shows that this was due solely to oversight by his lawyers and members of his staff who were handling this matter for him. I suspect, with all deference, that these financial disclosure forms that you gentlemen fill out is at least initially a work done by others. People do rely on others on these financial disclosure forms.

Now, last spring, your Staff Director, Mr. Abney, suggested that these reimbursements should be reported during the course of this investigation. And we thought Mr. Abney probably had a pretty good idea there. And shortly thereafter we informed him, first orally and then in writing, that the forms would be amended to do just this. And these forms were amended last July to report the travel expenses that we knew about at that time. I suggest to you that at most, this initial failure was an inadvertent and technical violation.

The legislative history of the Ethics in Government Act, which we're dealing with here that requires reporting, indicates that an official should be given a chance to correct disclosures before sanctions are imposed. And we have cited that legislative history in the brief we submitted to you a few weeks ago. Now, here the forms were corrected when the matter was called to our attention by your staff. And I submit that, in this circumstance, no sanctions are appropriate. There clearly was no intent to conceal the Piranha appearances because the $100,000 from Piranha was fully reported and reported on a timely basis.

Now, the campaign check issue involves a check from the PAC of the Pathology Practice Association, or PPA. A check that was written to the Senator's campaign committee and that Piranha put into its account. As Senator Durenberger spoke to PPA on December 5, 1986, and the Senator's records show that this appearance was designated as a Piranha appearance. The records also show that a representative of PPA was so notified by a written document. However, PPA did not send a check to Piranha as it should have done. Rather, the PPA PAC sent a campaign check somewhere. It doesn't appear that Senator Durenberger ever saw this check. He did not endorse this check to Piranha.

Mr. Bennett has said in a number of situations the Senator endorsed a check made out to him over to Piranha. But this check, this check made out to his campaign, was not endorsed by Senator Durenberger. It also doesn't appear that the check was sent to the campaign office, because the check was not endorsed by the campaign committee, it was not reported to the FEC as it would have been, had it come into the campaign office, and it was not deposited in the campaign committee account, as would be the normal practice.

Now, Piranha, when it got this campaign check obviously should have made some further inquiry as to why do we have this check that's made out to the campaign. But it is not appropriate to sanction Senator Durenberger in this circumstance, since he likely never saw or knew about the check. There certainly is no evidence that he intended to convert this campaign contribution to his personal use as the language of your charge suggests.

Now, what we have here are several unfortunate mistakes, but they are mistakes. And no sanctions should be imposed on Senator Durenberger for them.

Mr. Chairman, I would now like to focus on the condominium issues and the claim that reimbursements were improperly obtained from the Senate.

The facts regarding this matter are complicated, indeed, they are befuddling. In fact, I would like to adopt Mr. Bennett's rather elegant phrase that what we have here is a patina of complexity. I wish I'd thought of that.

I will try to simplify this to the extent that I can, given this confusing paper trail and faulty recollections. But one thing is clear, and I want to emphasize this at the beginning. At every turn in this matter, Senator Durenberger relied on lawyers, he relied on more than a half dozen lawyers, including Mr. Mahoney. Again, the affidavits we have submitted affirm over and over, his good faith reliance on the advice of others.

I'd also like to point out that, as to the condo, the only sworn statements that are before you are those that Special Counsel took in deposition form from Mr. Mahoney and Mr. Overgaard, the only sworn statements that Special Counsel has submitted. We have submitted sworn affidavits from all of the major participants as to this issue.

Many of the people involved in this episode are among the most substantial and prominent citizens of the State of Minnesota. Paul Overgaard, served for over 15 years in the State Senate. And in 1982, he ran for Governor.

Roger Scherer is now the Chairman of the Minneapolis Chamber of Commerce.

Doug Kelley, as I've said, is a former assistant U.S. attorney and he's now running for Governor of Minnesota.

Randy Johnson is a County Commissioner of Hennepin County, which is the largest county in the State of Minnesota.

And besides Michael Mahoney, there were other lawyers involved.

Dick Langlais, Don Lattimore, Jeff Robbins, Michael Schley, and Dave Steingart, who was then a clerk in Mahoney's office.

Now, in 1983, Senator Durenberger owned two homes in the Washington area and in Minnesota. And his good friend, Gene Holderness, came to the Senator and said, you've got to sell the condo. You can't afford to own two homes, given your financial resources. You've got to sell the condo, invest the money in something else, and get Senate reimbursement for renting. So they decided that they would consult Randy Johnson, who had been the lawyer for Senator Durenberger's campaign, about this. And they did. They went to see Mr. Johnson.

And the basic conclusion that was reached in these discussions was dispose of the condo and then rent it. Mr. Johnson said, orally and in writing, that if this is accomplished, the Senator could get Senate reimbursement if he moved his legal residence out of the Twin Cities area. This had been considered before, and eventually this was done. He moved his legal and voting residence to his parents' home in Avon, Minnesota. Mr. Johnson's opinion is reflected in the June 1983 letter that Mr. Bennett read to you, which is our Exhibit No. 65.

In July, 1983, at the suggestion of Roger Scherer, the Senator and Mr. Scherer agreed to put their two condos into a joint business venture, and to rent one condo to the Senator. They left it to the lawyers to work out the details of this transaction. Mr. Johnson had thought that a swap of the condos was the way to do this. And papers were even prepared to effectuate this. But Dick Langlais, who was then the Senator's tax lawyer, said that this was no good from a tax point of view. It would have adverse tax consequences. And he recommended that they should use a partnership device. So this is eventually what was done.

Mr. Langlais, in his affidavit says that he was told in July 1983, that the partnership option had been chosen.

Langlais and yet another lawyer in his office by the name of Don Lattimore, did the draft of the partnership documents, which expressly made the partnership effective July 28, 1983. But in December of 1983, the documents were still not finalized, although rents were being charged and reimbursements were being sought for the period beginning August 1, 1983.

In fact, Mr. Langlais says in his affidavit which we have submitted, that Senator Durenberger was displeased that the documents had not been completed.

Mr. Johnson, who is still in the picture, writes Senator Durenberger a letter in December of 1983, urging that this be done, that the papers be finalized. His letter indicated that Senate reimbursements for rents would be proper if Senator Durenberger's interest in the condo was transferred to the Partnership and then he rented the condo. And Mr. Johnson expressly advised, expressly advised, that the documents should be dated prior to August 1, 1983, to justify the reimbursements that, as I said, had started then.

Let me read, again, from this letter. Mr. Bennett has done it. I want to do it, too. And this is Exhibit No. 69. "It is important that you conclude the condominium transaction in order to justify the per diem reimbursement you received during the August recess. As I mentioned to you before, I believe the straight exchange with Roger bears some risk of being disallowed by the Internal Revenue Service. I am more concerned about the Partnership transaction and the allocations proposed by Dick Langlais. But he is your income tax specialist. In any event, from the standpoint of Senate rules and IRS regulations, I believe you can claim the per diem reimbursement, but the paper work on this should be completed immediately, if you have not done so already. Everything should be dated before August 1st, reflecting the oral agreement between you and Roger."

Now, the advice here, Mr. Chairman, given by Mr. Johnson, could not be clearer. Maybe it's not the best advice but is sure is clear, and there's no evidence that Mr. Johnson gave this advice in bad faith.

In December, 1983, Mr. Mahoney took over the partnership matters and other aspects of Senator Durenberger's affairs, like his taxes. And he and Dave Steingart, who was in his office, finalized the partnership agreement. And this agreement was expressly made effective July 28, 1983. The agreement said that it recorded and further defined an agreement that had been reached orally between the parties in July. The Langlais Lattimore draft had said the same thing.

Now, I should say that I'm informed that in Minnesota, the intent of the parties is important as to the effective date of a property transfer. The effective date of a transfer may be earlier than the date that a deed is executed, if the parties so intend. And I will cite you a case, and I'll provide you a copy which I just got last night, but I will provide it to you, a clean copy, as soon as I can, by the Minnesota Court of Appeals, Travelers Insurance Company v. Horseshoe Lake Farms, Inc., decided about two weeks ago.

I should also say that in the file, there is an opinion by the national accounting firm of Deloitte & Touche saying that, for tax purposes, for tax purposes, there was a partnership agreement as of July 1983, and deductions and all for Federal income tax was appropriate, based upon that agreement for 1983.

Now, in February, 1984, after Senator Durenberger and Mr. Scherer and their wives had signed these documents, they were sent to Mr. Johnson for review. Now, Mr. Johnson is also a notary and he notarized various documents that were sent to him, including quit claim deeds, even though Senator Durenberger and others had not signed these documents, including the deeds, in his presence. And Mr. Johnson dated his notarization July 28, 1983, which was the effective date of the partnership.

Now, as I said, this was not done in Senator

Durenberger's presence. The Senator had no knowledge of this backdating on the quit claim deeds until late last year. He had no intent to do anything improper in this regard. Instead, he relied on a bevy of lawyers to ensure propriety. But no lawyer in 1983 or 1984 suggested that it was improper to make this arrangement effective in July of 1983. No lawyer suggested that he couldn't get reimbursement for the period starting August 1983. No lawyer suggested that there was a problem if he was reimbursed for rent that was paid to a partnership he had an interest in.

And, Mr. Chairman, not only was the advice of lawyers sought, advice was sought from the Staffs of the Rules Committee and this Committee. In the file, there's a memo indicating that around March 13, the Senator's bookkeeper, Lori Krage, called both the Rules Committee and this Committee about reimbursements for partnership rents.

Now, let me read to you from Ms. Krage's March 13, 1984 memo. And, as Mr. Bennett has said, these are real time documents. This document was not written for consumption by the Senate Ethics Committee. It was written back in March of 1984 to convey information to Tom Horner, to whom it was written. Ms. Krage says, "I spoke with my contacts in Ethics and Rules, and no one has a problem with the partnership situation. Ethics seemed to indicate that it wouldn't be the first time it had been done. Rules also said, no problem, but I decided it would be wise to check with Ethics."

Let me read that, again, because I don't want anybody to forget that. "Spoke with my contacts in Ethics and Rules and no one has a problem with the partnership situation. Ethics seemed to indicate that it wouldn't be the first time it had been done. Rules also said, no problem. But I decided that it would be wise to check with Ethics, also."

Mr. Chairman, I submit to you that what this memo shows, if nothing else, that there was no intent to hide what was going on here regarding the partnership and the reimbursement situation.

Now, Special Counsel has referred to a March 21, 1984, memorandum from Lori Krage to Senator Durenberger, about changing the name of the condominium from the Durenberger Scherer Partnership to 703\603 Association. And the suggestion here is that this may show some type of intent to mislead the Senate disbursing office into thinking that Senator Durenberger had no ownership in the Partnership. But I suggest, Mr. Chairman, that this memo must be read together with Ms. Krage's March 13 memo that I just read to you, just read to you twice, which was written only one week earlier, which indicates that she told the Staffs of the Rules Committee and the Ethics Committee about the

Partnership and the reimbursements to it.

Now, if Ms. Krage really had some intent to mislead the United States Senate, she would not have gone and given these facts to watchdog committees. And, indeed, her affidavit which we have submitted as our Exhibit 4, affirms that no one in this matter had any improper intent to mislead the United States Senate. Moreover, the memo that Mr. Bennett read to you, the March 21 memo, indicates that the name change would be handled by David Steingart, who worked for Mr. Mahoney's firm.

Now, Senator Durenberger could assume that Mr. Mahoney or Mr. Steingart who worked on Partnership matters would object, if they thought anything improper was afoot. But they didn't object. The name was changed in due course.

I should also mention that Mr. Bennett says that the note on this memo next to the passage about the Partnership, Mr. Bennett says that that is in Senator Durenberger's handwriting. It is not. There are other notes on that document that are in Senator Durenberger's handwriting, but not the note next to the passage about the name change.

Mr. Bennett also suggested, I believe, that Senator Durenberger did not pay rent for the condominium in 1983. This isn't right. Once the Partnership books were set up, the rent was taken care of by a balancing of accounts. This was done in 1984 at tax time when Ms. Stow became the bookkeeper.

In 1986, changes in the tax law were imminent, and Mr. Scherer decided to end the Partnership arrangement. This new law, for which, by the way, Senator Durenberger voted, made real estate partnerships disadvantageous from a tax standpoint. A lawyer in Mr. Mahoney's firm, named Jeff Robbins, at Mr. Mahoney's request, wrote a November 12, 1986 memo saying that, as to reimbursements from the Senate, it made no difference if the condo was returned to Senator Durenberger. After conferring with a Staff member of the Rules Committee, he wrote, "nothing in the Senate travel regulations indicates that termination of the Partnership will affect Durenberger's ability to receive the per diem lodging reimbursement amount."

Nonetheless, despite Mr. Robbins' opinion, Mr. Mahoney advised that, if the condominium was returned to the Senator, he should not seek Senate reimbursement, so he advised that Senator Durenberger should sell this condominium to a third party. And thereafter, the Senator's good friend, Paul Overgaard, expressed some interest in buying the condominium.

Now, this made sense, by the way, for Mr. Overgaard, because Mr. Overgaard lives about 70 or 80 miles from Minneapolis and he comes to town two or three times a week, or for two or three nights a week sometimes, sometimes less perhaps. And he needed a place to stay. If he knew that Senator Durenberger would rent this on the weekend, this was a good arrangement for him. He could buy a condominium, he would have a place to stay, but he would also have rental income on the weekend, and this economic fact convinced Mr. Overgaard that he should enter into this arrangement.

Now, at some time, it was decided that his company, Independent Service Company, would be the purchaser. Now, exactly when this deal was struck is not certain. The sworn testimony of Mr. Mahoney, Mr. Kelley and Mr. Overgaard, in their affidavits and their depositions, indicates that they reached this agreement in late 1986 or early 1987. And indeed, our Exhibit 87, a January 11, 1989 letter from Overgaard to the Senator, confirms this. And I'll discuss this letter in a moment.

The eventual sale agreement to ISC was dated April 1, 1987. But it's clear that the papers were prepared by Mr. Mahoney much after the April 1, 1987 date. The downpayment check from ISC to Senator Durenberger for over $7,000, is dated August 27, 1987.

Originally, the plan was to make the effective date of the purchase January 1, 1987, but this was changed. Why was it changed? It was changed because it was learned that Senator Durenberger had already been reimbursed for rents paid to the Partnership for the period January to March,

1987. Mr. Overgaard testified that he wanted this transaction handled cleanly and properly so therefore they changed the effective date of the transaction.

Senator Durenberger paid rents to ISC for the period starting as of April, 1987, even though the initial rent payments for this period were made some time after that date. In late 1987, Senator Durenberger sought Senate reimbursements for these rental payments to ISC. And this was done after Mr. Kelley was convinced that the effective date of the sale really was April 1, 1987. He held up the request for reimbursements for some months until he was convinced that this was the effective date of the sale. Kelley said that he specifically did this because he didn't want anything improper to occur.

Now, Mr. Kelley had his own political ambitions here. He had his own reasons for not wanting to be involved in anything that appeared improper. So his testimony is that he was particularly careful that nothing be done in this transaction that was not proper, and therefore he held up the reimbursement request until late 1987.

Mahoney had continued to delay finalizing the sale papers. Mr. Overgaard, as you've heard, repeatedly complained about this, and he even offered, on several instances, to reverse the transaction. And Senator Durenberger complained to Mr. Mahoney in several calls and in several notes that are part of the record. And finally, at the end of last year, this transaction was completed to Mr. Overgaard's satisfaction.

Now, Special Counsel has read to you the entire September 8, 1989, letter from Mr. Overgaard to Senator Durenberger. And this letter, to repeat, complains about Mr. Mahoney's slowness in completing the transaction. Mr. Overgaard wrote that he didn't want to be accused of participating in a sham transaction, and said, "this is certainly a conclusion that could be reached as things stand now."

Now, this letter was plainly written out of frustration with the delay in the process, frustration with the problems being caused regarding Mr. Overgaard's auditor, and I think it was clearly written to spur Senator Durenberger and Mr. Mahoney into action. But it's clear, I think, from the face of this letter that Mr. Overgaard was not saying that this transaction was a sham. What Mr. Overgaard was worried about were appearances. He was not worried about the reality of the situation, he was worried about the appearances from this delay. The reality, as Mr. Overgaard said in his deposition and in his affidavit, which is Exhibit 15, was that there was a final deal with Senator Durenberger and that he had no legal obligation to reconvey this condominium to Senator Durenberger.

In this letter that Mr. Bennett read from, Mr. Overgaard offers to tear up the papers and to call the whole thing off. Now, I suggest to you that if this really was a prearranged sham transaction, if there really was some deal out there to reconvey, that Mr. Overgaard wouldn't have made this offer in this heated letter to tear up the papers. The letter is not consistent with the notion of a sham. If there had a been a sham, if there had been a scheme unlawfully to invade the reimbursement rules, I suggest to you that a letter written in the midst of an Ethics investigation would not have remained in two people's files. And, as Mr. Bennett has told you, this letter was produced to this Committee from Senator Durenberger's files. You know about it because we gave it to you.

I think a document that better shows the true nature of the deal is a January 11, 1989 letter, which is Exhibit 6, from Mr. Overgaard to Senator Durenberger. And, again, this letter complains about Mr. Mahoney's slowness in completing the paper work. And, again, it offers to reverse transaction. The letter starts off like this, remember, this again is a private letter to Senator Durenberger. This is a real time document, to use Mr. Bennett's phrase. It is not a document that was written for the consumption of the Ethics Committee. The document starts off, "it is now nearly three years since we entered into an agreement that

Independent Service Company would buy your condominium unit. ISC made the agreed-to payments, executed the contracts provided, and assumed payments to the bank management company for monthly service and payment of taxes."

Mr. Overgaard was wrong in that the basic deal had been struck two years before, in late '86 or early '87, not three years before.

But the letter is a clear indication that there was a firm arrangement, that beneficial interest had passed, and that this was not a sham transaction. Indeed, as Mr. Bennett has said, Mr. Overgaard's affidavit flatly says that this transaction was not a sham.

Mr. Chairman, it is clear that the sale to ISC was not handled in an ideal fashion. And Mr. Mahoney, in his deposition, which is our Exhibit 106, has candidly admitted that. He has said, and this is at page 254, that "in certain respects, his conduct was embarrassing and stupid," to use his terms, not mine, his terms. And he added, and I quote, "I don't think this a model of how to do a transaction."

Mr. Chairman, while the sale to ISC was handled in a sloppy fashion, the evidence shows that the transaction was a real one. And that beneficial interest passed, despite the loose language in some of the correspondence. Money changed hands. Mr. Overgaard made a downpayment to Senator

Durenberger. Rents were paid by Senator Durenberger. Expenses were paid by Mr. Overgaard. Mr. Overgaard took a tax deduction for depreciation. Overgaard and Senator Durenberger believed they had made a final sale.

If this transaction was not real, why did Mr. Overgaard complain so vociferously about Mr. Mahoney's delays? There's no good reason, if the transaction was not real, if he didn't intend it to be completed.

As Special Counsel notes, the rents to both the Partnership and ISC were calculated to cover their cost of holding the property, and suggests that somehow this was improper. But I submit it was not improper. If the rents were within the allowable rates, which they must have been because the Senate disbursing office paid them, and if the reimbursements were only for official business stays. It seems only sensible to look at the number of probable stays during a year, and fix the rent accordingly. You don't have to read that businessman's decision as evidence of something illegal.

The fact of the matter is that the Senator, for years, years he's been in the Senate, has been in Minnesota and mainly Minneapolis for around 100 days every year on official business. And, by the way, so has Senator Boschwitz, who affirms this fact in a letter that has been submitted in this record, which is Exhibit 95. Senators from Minnesota go back to Minnesota frequently, and when they are there, they are in the Minneapolis area because that's where the people in Minnesota are.

I think it's interesting that Mr. Overgaard's company actually took in more than its costs. In other words, it made a profit on this transaction over the years because Senator Durenberger is in Minnesota so often on official business.

In December 1989, after a Minneapolis Star Tribune article, Senator Durenberger asked the Senate Rules Committee about the propriety of reimbursements that he had gotten. Before this article, he had not questioned these reimbursements. Now, the response of the Rules Committee, in essence, indicated that if his condominium was his usual place of residence during adjournment, it was his duty station and reimbursement was not proper for these adjournment periods. So Senator Durenberger paid back to the United States Senate over $11,000.

I'd like to make several comments about the opinion of the Rules Committee. First of all, it is contrary to the advice that Senator Durenberger received from Mr. Johnson and from Mr. Mahoney.

Secondly, it is contrary to the advice that Lori Krage, his bookkeeper, apparently received from the staff of the Rules Committee and this Committee.

In any event, the governing rules here were just not clear. And a good faith mistake as to what was allowed was possible. The Rules say, only, and I'm quoting, "traveling expenses which will be reimbursed are confined to those expenses essential to the transaction of the official business while away from the official station or post of duty. The official duty station of all Senate members and employees shall be considered to be the metropolitan area of Washington, D.C. The official duty station of senators shall be considered to be their resident cities in their home state during adjournment sine die, or the August recess."

Let me read that last sentence again. "The official duty station of Senators shall be considered to be their resident cities in their home states during adjournment sine die or during the August recess."

Now, the technical question here is whether the term "resident city" means legal and voting residence or it means where the Senator usually stays. We now know that it's the latter from the Rules Committee opinion a few months ago. But before this opinion came out, this issue was not clear, and a good faith mistake as to this matter could have been made. And, indeed, a good faith mistake was made by Senator Durenberger's attorneys and therefore by Senator Durenberger.

It's also clear from the numerous invoices submitted to the Senate, Mr. Bennett has put these invoices in, there are about that many of them (indicating), from the numerous invoices submitted to the Senate, it's clear that the condo was Senator Durenberger's usual place of residence in Minnesota. Yet no one for six years, in the Senate disbursing office, questioned reimbursement for staying at this condo. There was no warning for six years to Senator Durenberger that it was a problem for getting reimbursed for staying at this condo. And, again, if the Committee will look at these records, anybody reviewing these things will know that he was staying over and over again in the same condominium.

Mr. Chairman, maybe these vague rules have been contravened but, again, the facts don't clearly and convincingly point to venal conduct. Rather, the facts show that Senator Durenberger relied on more than a half dozen lawyers to handle these things right for him.

As I've said before to this Committee, if Senator Durenberger, Mr. Scherer, Mr. Overgaard, Mr. Mahoney, Mr. Kelley, Mr. Johnson, Mr. Langlais, and the rest of this crew, wanted to conspire to help Senator Durenberger unlawfully circumvent the reimbursement rules, they would not have done it in the way that this was done. They would not have left a bizarre convoluted paper trail that takes an Einstein or a

Bob Bennett to figure out.

Mr. Bennett has represented a lot of people charged with fraud. And he knows better than most of us, that if somebody intends to cheat, they don't do so by leaving a jigsaw puzzle paper trail that absolutely defies comprehension.

In sum, I submit that the circumstances here where an abundance of lawyers were involved, where two Senate committees were consulted, do not show intentional impropriety. And they don't demand a draconian sanction like denouncement. Some other sanction, maybe, but not denouncement.

Mr. Chairman, I want to talk briefly about three secondary issues that are part of the charges here: the blind trust, the limousine trips, and the speeches in the Capitol buildings.

Chairman Heflin. Mr. Hamilton, let me ask you, how long do you think it will take you to complete? We are now at 5:30, which was the adjournment designated time. And we shortly have some votes in the Senate. Had you preferred to finish now? I don't know whether we can or not. Or would you prefer to do it in the morning?

Mr. Hamilton. Mr. Chairman, I would prefer to finish now because I really do think that it's only fair for Senator Durenberger that his position as to all of the charges and as to the sanction be on the public record.

Chairman Heflin. Well, I would assume it would be on the public record, whether today or tomorrow.

Mr. Hamilton. Well, I think it's only fair that they be on the public record the day that Mr. Bennett has put his position on the public record.

Chairman Heflin. Well, --

Mr. Hamilton. I think I can finish --

Chairman Heflin. How long do you think it'll take for you?

Mr. Hamilton. I think I can finish, Mr. Chairman, in less than a half an hour.

Chairman Heflin. We've got votes and each of us had made plans. The deadline that we had set for adjournment today was 5:00 o'clock. I don't think we can do it, and people have planned other things.

I would say if you're going on for 30 minutes, that we'll have to stop in say, ten minutes anyway. I don't think we can go longer than ten minutes now. So you want to go ten minutes, or do you want to adjourn until tomorrow?

Mr. Hamilton. Well, Mr. Chairman, if there's a chance that I'm going to be interrupted, I think I would just as soon adjourn.

Chairman Heflin. All right. We'll stand in recess until 9:30 in the morning.

(Whereupon, at 5:32 p.m., the Committee was adjourned, to reconvene the following day, Wednesday, June 12, 1990, at 9:30 a.m., in the same place.)

Transcript of Hearings

Before The

United States Senate

SELECT COMMITTEE ON ETHICS

Hearing on

THE MATTER OF

SENATOR DAVE DURENBERGER

Washington, D.C.

WEDNESDAY, JUNE 13, 1990

Hearing on
THE MATTER OF
SENATOR DAVE DURENBERGER

* * *

WEDNESDAY, JUNE 13, 1990

United States Senate
Select Committee on Ethics
Washington, D. C.

The committee met at 9:36 a.m. in Room 216 of the Hart Senate Office Building, the Honorable Howell Heflin, chairman of the committee, presiding.

Present: Senators Heflin, Rudman, Pryor, Sanford, Helms and Lott.

Staff Present: Wilson Abney, David Apol, Victor Baird and Annette Gillis.

Senators' Staff Present: Jim Farrell, Rudman staff; Barbara Larkin, Sanford staff; and Stan Harris, Lott staff.

Also Present: Robert Bennett, Special Counsel, Frances Wetzel, and Abigail Raphael.

On behalf of Senator Durenberger: James Hamilton, Mary Albert and Karen Tomcala.

Mr. Hamilton. Good morning, Mr. Chairman, members of the Committee.

Yesterday, we dealt with the major issues involved in this matter, the Piranha Press arrangement and the condominium transaction.

Today, I want to mainly deal with what I would consider secondary issues; the blind trust, the limousine trips, and the issue of speaking in Capitol rooms for a fee.

But first, I want to make one very brief comment on Mr. Bennett's assertion of yesterday that Senator Durenberger improperly intended to circumvent both the rules regarding honoraria and the reimbursement rules. And I want to be very clear about this so there's no misunderstanding about our position.

Senator Durenberger was seeking, he was seeking, to earn income that was not subject to the honorarium restrictions, and he was seeking to obtain rent reimbursement for rents paid for the condominium. But his conduct only deserves a harsh sanction, if the evidence shows that he intended to do these things by some illegal means. As I've said, yesterday, the evidence shows the contrary. The evidence shows that he sought legal advice at every turn. That he obtained an opinion from the FEC, that he sought advice from this Committee and from the Rules Committee, and that he believed he was acting properly.

Attempting to obtain income by means believed to be legal is not reprehensible, even if some mistakes were made along the way.

Mr. Chairman, I would like to turn to the issue of the blind trust. And while there were some violations of the Rule, here, none of these warrants any strong sanctions.

Now, in 1985, at the suggestion of his lawyer, Mr. Michael Mahoney, Senator Durenberger set up a blind trust. Mr. Mahoney became the trustee of this blind trust and another lawyer in Mr. Mahoney's office, by the name of Michael Schley, worked on the papers. Now, the basic purpose of this blind trust was to help Senator Durenberger avoid conflicts of interest and to stay in compliance with the Ethics rules. There is some obvious irony here, because now this blind trust set up to ensure compliance with Ethics rules has resulted in an Ethics charge.

Only three assets were put in this blind trust: a money market account, an interest in a small corporation; and the interest in the Partnership that owned the condominium. Only relatively small values were involved in this.

Now, all of these interests were reported to the Committee, including the Senator's interest in the Partnership that owned condominium 703 and condominium 603. So this ownership was fully revealed to this Committee.

Now, from the outset, this blind trust really made little sense. Senator Durenberger's hardly the paradigm of the wealthy legislator who needs a blind trust to avoid conflicts of interest. He is just not a rich man. He doesn't need this type of device.

It was also nonsensical to put into this trust the interest relating to the condominium where Senator Durenberger stayed when he went back to Minneapolis. The Rules are clear, that the trustee and the beneficiary generally can't communicate about the assets in the trust. Putting the interest relating to the condominium where Senator Durenberger stayed in this trust virtually ensured from the beginning that the rules about communication would be broken. His lawyer and his trustee, Mr. Mahoney, didn't tell Senator Durenberger that they couldn't talk about the condominium. Indeed, the record shows that Mr. Mahoney engaged Senator Durenberger in conversations about it, sought his advice about it, particularly when they were considering selling this condominium to Mr. Overgaard.

Mr. Mahoney has testified that he just didn't think about this problem. And I would like to read from his April 17, 1990 deposition, which is Exhibit 106.

"Question. And you understood, at this time, that the Senator was staying overnight in the condo during trips to Minneapolis?"

"Answer. Yes."

"Question. Right. And he was claiming reimbursement from the Senate for some or all of those overnight stays?"

"Answer. Yes."

"Question. Did you have any discussions with the Senator about whether or not that activity was consistent with the concept of a blind trust?"

"Answer. No."

"Question. Did you have any views on that, yourself?"

"Answer. No."

"Question. Did you ever think about that?"

"Answer. No."

Mr. Chairman, there was a violation of the Communications Rules, but I submit that this violation or these violations were not heinous, they were not reprehensible, they did not discredit the Senate. They were just mistakes and they don't justify a strong sanction.

I'd like to focus now on the limousine trips in Boston. In 1985, 1986, Senator Durenberger took a number of trips to Boston to visit a marriage counselor by the name of Dr. Armand Nicholi. Dr. Nicholi is a well-known professional in the field. For Senator Durenberger, these were meaningful sessions. At the time, he was separated from his wife. He was living in the Cedars, which is a religious retreat in Northern Virginia. The times were trying. He needed help, and that's why he went. At times, Mrs. Durenberger went with him to see this marriage counselor. He continued to see Dr. Nicholi because Nicholi brings a spiritual approach to his counseling that the Senator responded to. It was the type of approach that he needed. And eventually, the Senator and his wife were reconciled.

Often when Senator Durenberger went to Boston, he spoke to various groups and these groups paid his transportation and his lodging expenses. They did not pay him honoraria, in almost every case, but they did pay transportation and lodging expenses. And this Committee, although it investigated this matter, has not challenged the propriety of it. Dr. Nicholi's office is in Concord, which is some distance from Boston, and the groups that the Senator was speaking to provided him round trip transportation by private car from Boston to Concord and back. These sessions were normally from about 8:00 o'clock in the morning until 12:00 o'clock at noon.

And normally, the groups that provided transportation held a luncheon meeting the day that the Senator was there, and the Senator would go, would make an appearance, would speak at the luncheon meetings. The waiting car at Dr. Nicholi's office facilitated the Senator's being at these luncheons on time. And, frankly, because Senators are used to private cars, Senator Durenberger didn't question the propriety of this transportation. When this investigation started, Senator Durenberger discovered that these trips were more expensive than he had realized and that the gift rule had been violated. He has admitted his mistake in this regard and he has apologized.

But nonetheless, I submit to the Committee, Mr. Chairman, that these circumstances don't demand a harsh sanction. These were gifts, yes, but they were not for entertainment. We're not talking about trips to Bermuda or the Virgin Islands. We're not talking about golf or ski vacations. We're not talking about nightclub tours or even lavish dinners. Instead, we're talking about trips that were part of an attempt by Senator Durenberger to save his marriage. A mistake, yes, a violation of the rules, yes, but reprehensible conduct, no. This is not the type of conduct in these circumstances that brings the Senate into disrepute. It's not the type of conduct that demands a harsh sanction by this Committee.

I'd like to look at the issue of speeches for a fee in the Capitol buildings. In 1985, on six occasions, Senator Durenberger spoke for Piranha in the Senate or the Capitol buildings. He spoke to the groups like the National Conference on Catholic Charities and the American Protestant Health Association, and to the Washington Campus, which is a group that a number of members speak to.

Now, the Committee's charge suggests that this is a violation of a Federal misdemeanor statute, as interpreted by the Rules Committee. Now, as detailed in our brief we submitted several weeks ago, and in our recent letter that we submitted last Friday, the statute just does not cover the conduct involved. The statutory provision that is cited prevents certain commercial activities on the Capitol grounds, the Capitol grounds, a term that is separately defined by the statute to cover the areas outside of the Capitol buildings. The provision does not cover conduct in the Capitol buildings, which has a different and a distinct definition. Other separate provisions of this statute do cover and prohibit conduct in the Capitol buildings, but not the provision cited. Moreover, the language in this provision doesn't clearly cover speaking for a fee, even on the Capitol grounds. Instead, the language covers offering articles for sale, displaying advertisements, soliciting fares, alms, subscriptions and contributions on the Capitol grounds.

In this circumstance, the most basic principles relating to the interpretation of criminal statutes demand a conclusion that this statute is not applicable. A criminal statute must be narrowly construed. A person must have fair notice of what conduct is prohibited. This is required by the due process clause of the Constitution. If this statute really applied inside the Capitol buildings, the Senate barbershop, the Senate vending machines, the gift shops, would all be illegal.

Mr. Chairman, I would like to borrow another one of Mr. Bennett's felicitous phrases and engage, as he says, in a moment of informality. Like Mr. Bennett, I also have two very young associates working for me, Mary Albert and Karen Tomcala. And Ms. Albert went down this morning to the gift shop downstairs and bought this redskin T-shirt at the gift shop downstairs. Now, if this statute really applies, the vendor down there, the sales lady, is violating a criminal statute by selling Ms. Albert this T-shirt. Now, I don't think the statute applies. You're nodding your head, Senator Helms. I agree with you. I don't think it applies. And it doesn't apply to Senator Durenberger's conduct, either.

I think it's not surprising, yesterday, this three-hour argument, that Mr. Bennett did not mention this statute. This charge ought not be part of this Committee's proceeding. I knew my argument was effective on that point, I didn't realize it was that effective.

Now, the Rules Committee pronouncements prevent using rooms for profitmaking activity, they don't interpret this criminal statute. Nothing in the Rules Committee pronouncements comes close to mentioning this criminal statute. They stand alone. These provisions do not specifically prohibit speaking for a fee. I suspect that other Senators would be most surprised to learn that they can't speak for a fee, they can't speak for honoraria in the Senate or Capitol buildings. And if they did, that they are committing some type of a crime.

The evidence that Special Counsel has gathered shows that other Senators and Congressmen spoke for a fee at the very same sessions that Senator Durenberger spoke at. Senator Durenberger also, like these other Congressmen, didn't realize that the Rules prohibited this. And, given the confusion that exists about all of this, I respectfully submit that no sanction is appropriate. With deference, I suggest that the better course is for this Committee or the Rules Committee to issue prospective guidance to all Senators as to precisely what is prohibited in this regard.

Now, the question has been raised, why, particularly, as to Piranha and the condominium matter, didn't Senator Durenberger react to some of these warning red flags that appear to have been present. Why didn't he see that others might look askance at what was transpiring. I think there are several reasons why he did not. First of all, as I have said, I suppose, over and over again, and you're tired of it, he sought advice and had received comforting responses from over a half dozen lawyers, from the Staff of this Committee in the condominium situation, from the Staff of the Rules Committee in the Piranha situation, from the Federal Election Commission, an opinion that, as I said, yesterday, was interpreted perhaps wrongly as giving him free rein as to how these appearances were handled.

But, second, Mr. Chairman, there were some personal factors that tended to keep Senator Durenberger from focusing clearly on some of the issues before him. These included marital problems that required extensive counseling, the chemical dependency problem of two of his sons, burdensome expenses that he faced for education, medical treatment, his own counseling, housing, and other things. These expenses were occurring as his income drastically dropped, after the honorarium limitations were passed. He also had an extremely heavy Senate schedule, as I'm sure you all know, at times, that was complicated by chaotic staffing situation in his office. This schedule, these situations left him innovated and perhaps left him with judgment that was somewhat impaired.

Now, various affidavits attest to Senator Durenberger's inability to focus on his personal finances and to his extensive reliance on others as to such matters. And those affidavits are in the record. Senator Durenberger, Mr. Chairman, will talk to you in a few moments about these and other matters.

Special Counsel recommends denouncement. We think the term "denouncement" in these circumstances is much too harsh. There was only one other Senator in the history of the United States Senate who has been denounced, and that was Herman Talmadge in 1979. Mr. Chairman, I'm not an expert on very many things but I guess I'm an expert in that case, because I represented Senator Talmadge in that case. The other expert in the room is Senator Helms, who sat on that panel. That case was significantly different. In that case, there was criminal conduct, not by Senator Talmadge and let me stress that, but there was criminal conduct by his administrative assistant. His administrative assistant was stealing money from the United States Senate by using trumped up reimbursement request that in the main had no basis in fact. And he was stealing money from Senator Talmadge's campaign account.

This aide, Mr. Chairman, went to jail for his conduct. Now, the main issue in the Talmadge matter was what did Senator Talmadge know about this. And the Committee did not conclude that he knew his aide was stealing from the campaign and from the Senate. But the Committee did conclude that he should have known and that he was responsible in a general way for this criminal conduct that was going on in his office.

Mr. Chairman, in this situation, we have no criminal conduct by anybody. Moreover, unlike the Talmadge case, we have reliance on multiple lawyers, reliance on the Staff of two Senate Committees, and reliance on the FEC. Simply put, Mr. Chairman, the Talmadge sanction just doesn't fit the situation here, which is distinctly different and, given the absence of this criminal conduct, is not as serious.

Some sanction, as we have said, may be appropriate, but nothing so harsh as denouncement.

Looking at the Senate and House disciplinary cases that we discussed in the brief we've filed, one comes away with the view that sanctions should be lighter, less severe, where there was no intent to violate rules, where the advice of counsel was relied on, where the advice of responsible governmental bodies was relied on, where there was a misunderstanding of the law, where there have been efforts to correct mistakes, and where there were other mitigating factors such as personal strain, that impaired judgment. All of those factors, Mr. Chairman, are present in some degree in this case. And these factors counsel a different result from denouncement.

Mr. Chairman, I'd also like to submit that the term Mr Bennett used, yesterday, reprehensible, to apply to the Senator's conduct is also much too harsh, much too harsh. The term, reprehensible, conjures up notions of moral turpitude, of venality. And it's just not appropriate in this situation where advice was sought at every turn from lawyers and official bodies. Whatever you want to say about Dave Durenberger, whatever you want to say about the mistakes he may have made, Dave Durenberger is not an evil, reprehensible man. You're his colleagues. You know this better than I do. And if there's any doubt in anyone's mind about this, look at the affidavits that we have submitted from Doug Coe, who heads the religious retreat where Dave Durenberger once stayed, and look at the affidavit from United States District Judge Paul Magnuson, which we submitted to this Committee yesterday morning.

Mr. Chairman, we have given much thought as to how to proceed at this hearing. There are two principal factors that shape our decision in this regard. The first is that certainly most of the facts are already known to this Committee. Special Counsel and your Staff have taken extensive depositions, they have obtained many affidavits, they have collected voluminous documents, many from Senator Durenberger, and they have submitted some 450 exhibits.

As I noted when I began, we were not allowed to participate in this process of collecting evidence. For example, those who were deposed were not subject to cross examination by me. And, frankly, I believe that cross examination would put matters in a much more favorable light for Senator Durenberger.

However, Mr. Chairman, and this is my second point, to try this case correctly and thoroughly would be a horribly expensive matter for Senator Durenberger. A proper hearing here would take six weeks to two months. Special Counsel has talked to over 200 people. He's submitted around 100 depositions and affidavits, and frankly Senator Durenberger already has sizeable legal bills. He just can't afford an extended two-month hearing.

After long thought, we have concluded that we will submit this matter for judgment by the Committee on the basis of the exhibits submitted by Special Counsel and by us and that we will not call witnesses. Our exhibits, especially our affidavits, go principally to show Senator Durenberger's good faith in the matters before you. They show that he did not intentionally violate any rule or any law.

Consequently, Mr. Chairman, I would like to move into evidence the affidavits and other exhibits that we have previously submitted to Special Counsel. And we do reserve the right to call witnesses if Special Counsel choose to do so. And, Mr. Chairman, I do request that Senator Durenberger be allowed to address the Committee at this time.

I appreciate your attention. I would like, if I may indulge the Committee, to take about a ten or 15-minute recess before Senator Durenberger comes on.

Chairman Heflin. Well, in regards to you moving the record, the proper procedure is that the Special Counsel, he presents his evidence and presents his affidavits, and then you can do it at that time. We're at the opening stage which are opening arguments at that time. And you can handle your case any way you want to but the first part of it would be the burden of proof is on the Committee to establish the case, and then you can move your exhibits and whatever you want to move as evidence at that particular time.

We'll stand in recess.

(Recess.)

Chairman Heflin. Senator Durenberger wants a little more time. If so, we'll accommodate him and we'll stand in recess for, say, another five or ten minutes, I suppose. Should he, by that time, be ready to proceed?

Mr. Hamilton. I expect so, Mr. Chairman, and I appreciate your indulgence.

Chairman Heflin. All right, sir.

(Recess.)

Chairman Heflin. All right, we'll go ahead.

Senator Durenberger?

Senator Durenberger. Mr. Chairman, if you will permit me, I want to first compliment and to thank my attorney, Jim Hamilton. My father, who was an English professor as well as a college athletic director for many of his so-far 83 years, observed last night about Jim, he seems to have the same dialect of the English language as five members of the Ethics Committee.

I want to thank you, Jim, and I want to thank Mary Albert and Karen Tomcala for all that you've meant to me during this process.

And I'd like to say thank you, and indicate I can never repay my debt of gratitude to my friend, and Chief of Staff, Bert McKasy. And to Steve and Alexander and Jody and Chris and all of my Washington Staff and to Alice and John and really marvelously unique Minnesota staff, I say thank you, as well. To my friends here and in Minnesota, let me say to you, gentlemen, only in times of genuine and significant need, do you really know what that word means. And I have been twice blessed. I will say more about my family, later, but in politics, you're born into another kind of family and I'm tremendously grateful to mine. To my colleague, Rudy Boschwitz, to all of my congressional colleagues from Minnesota, I say, thank you for your kindness in a very difficult time.

The poet, Yeats, at the end of his life, wrote, "think where man's glory most begins and ends and say my glory was to have had such friends."

Members of the Committee, my colleagues, I have a statement to make this morning. In the formal sense, it's a statement to you and to the rest of our 93 colleagues in the Senate, but it is also to a larger audience outside this room, in this city, in Minnesota, and across the country. It's not a statement I enjoy making but it is one I have longed to deliver. And for that reason, alone, I welcome these hearings because they afford me an opportunity to say some things, though briefly, that need to be said.

My attorney has dealt with many of the legal and the factual questions. And my purpose today is to deal with the personal and context issues which I believe should inform your judgment and the judgment of the people in Minnesota on these matters.

I'm going to deal with four subjects: the proper historical context for the events in question; the condominium Partnership, the publishing arrangements, and the lessons I've learned from all of this. And then I'll close with a special request to the Committee.

Gentlemen, I don't need to tell you that reputation is the life blood of public service. By any analysis, after 21 months, this process has left this public servant about a quart low. This has been an exceedingly costly experience for me in many ways. I entered elective office for the first time in 1978 at the age of 43. My desire was to address the decline in public confidence in public institutions. So while it is personally painful for me, as a former member of this Committee, and as a member of the Senate for 11 years, to be before you in this circumstance, I must tell you I recognize the necessity and the importance of what we're doing here.

I hope you will agree that I've done everything within my power to cooperate with the Committee. I turned over literally thousands of documents to the Committee. Most of the so-called evidence in this matter was willingly given to the Committee. Much of Mr. Bennett's talk, yesterday, was built on his interpretation of what are usually very personal notes and memorandum, all of which were made available to this Committee. I took the unprecedented step of releasing my personal attorneys from their attorney client privilege regarding matters under investigation so they could speak freely, and I encouraged them to speak freely to this Committee. And you acknowledged as much yesterday in your statements.

But, in addition, I have tried very hard, very hard for 21 months to refrain from talking about this matter, in spite of the intense media interest and my own political survival instinct to get my side of the story out. And I think you will affirm that I have never once worked the facts in this case with my colleagues, any of you, on this Committee, even though we have all of these political and personal relationships. I have respected the process, and I've tried to bring it to a responsible and a fair conclusion.

In the final analysis, your judgment will rest on conclusions you make about me and about my motivations during this period. You will be examining volumes of records, factual statements and other materials. And I would urge the Committee, and those observing these events, not to let the presence of accusation color the interpretation of the facts. There's more than one way to read this record. I know, because I've lived it.

I would ask you to carefully consider five points which any fair judgment should take into account. First, in all these activities to the degree that it was humanly possible, I acted in good faith, with no intent whatsoever to violate the rules of the Senate. I know that in my heart that is the case. That good faith is evidenced in many ways, not the least of which is in the way that I've related to this Committee throughout this process.

Second, all the key decisions were based on the advice of outside, independent counsel, often two or three attorneys, and reaffirmed by contacts with the Ethics Committee, the Rules Committee, or the Federal Elections Commission, whichever had jurisdiction. I used outside counsel, in part, because I was on the Ethics Committee in

1983, and of what I learned there. I came to believe that in a Rules driven Ethics system, the lawyers who represent themselves have fools for clients. I didn't use a lawyer on my Senate Staff, I used outside counsel. And I state this for background purposes, not as an excuse. I, of course, accept full responsibility for the errors which were made.

Third, if I established a pattern of conduct, it was to throw myself aggressively into my work as a United States Senator, to be as effective a United States Senator as I possibly could be. That created certain strains and vulnerabilities in my personal life and in my decisionmaking process. Again, not an excuse; just background.

But I have been a good Senator for the people of Minnesota and for America.

Fourth, I have never sold my vote nor improperly used my influence with any Federal Agency for my personal gain. Nothing I've ever done as a Senator has compromised the public good for the benefit of a special interest.

And, fifth, the first four points notwithstanding, I clearly recognize that my actions and inactions have hurt many many of my family, my friends, my staff, my supporters and the people of my State. And for that, I am deeply sorry.

I know I have incurred a debt I will have to work the rest of my life to repay.

This investigation and this hearing focuses on only a few years of the 55 years of my life. While it may appear proper to talk about those years as if we could somehow cleanly separate them and study them, there is much living that has affected those years. And very briefly, let me give you some context.

I was born on the campus of the Monastery of St. John's Abbey and University in Collegeville, a second generation Minnesotan. My father, the college athletic director for 42 years. My mom, a super woman, a mother, teacher and a volunteer. I graduated from grade school, a two-roomer, high school and college at St. John's. St. John's is a Benedictine community and the Benedictine motto is work and pray. And I must say, I learned those lessons well, as you will see during the course of this matter.

I spent time in the Army, I graduated from the University of Minnesota Law School in 1959, and I joined a firm in South St. Paul. In 1962, I married Judy McGlumphy. Our sons were born in 1963 and 1964 and 1965 and 1967. We discovered that Judy had breast cancer at the birth of our youngest son, Danny, who happens to be with me here today. She died three and a half years later at the age of 31. At that time, I was serving as Governor Harold Lavenders' chief of staff.

Shortly after Judy's death, I became H.B. Fuller

Company's legal and community affairs counsel. And I became active in the leadership of literally dozens of community organizations. Despite appearances, I was overwhelmed by the sadness and the daunting challenge of raising four small sons under the age of eight. Within a year of Judy's death, I met and married Penny Toohey. She was a Vietnam war widow of a U.S. Marine Captain. Steve Toohey was killed in the Tet Offensive. And Penny undertook to help raise these four boys. While she had her own cross to bear, she added five more of ours.

With a mother lost to Charlie, David, Mike and Danny, a husband lost to Penny, and a wife lost to me, sadness made bonding difficult in our family. Some of that sadness was acknowledged but a lot of it was never dealt with. My grief counseling was to throw myself into my work. And, yes, gentlemen, that was a serious mistake but one I didn't know how to acknowledge.

I was elected to the United States Senate in 1978 and, again, I threw myself into my work. And, as you know, that's not hard to do around here. Over the past 12 years, I have been extremely proud of representing the people of Minnesota, handling their constituent issues, helping develop legislation on national health policy, intergovernmental relations, national security, tax reform, civil rights, and economic equity of the environment ard, most recently, as you know so well, the work on the Clean Air Act, the Pepper Commission, and the Americans With Disabilities Act, among many other areas.

Yes, there've been many ups and downs in my personal life. But I thank God for the friends, staff past and present, and the constituents who have supported me. And I thank God especially for my family, because they have remained the keys in my daily life, even after everything I've put them through. My parents, my four brothers and sisters, Penny, her folks, Charlie, David and his wife, Sue, Mike and Danny. And I just may say every time there's a cloud, there's a silver lining because the happiest day in a long time was being at the University of Minnesota on Sunday to see David, the number two son, graduate after eight years spent in four different colleges and knowing what he's been through in his life, the happy moment of seeing him walk across the stage and then actually being able to hug him wearing that cap and gown. And that says a lot for my family.

Yes, there have been good times and tough times in my career. But I want to tell you that one thing remains constant. I believe deeply in public service. It's been my vocation, it's been my passion, and sometimes my refuge. And whatever public service has cost me, including the opportunity for personal wealth or, for that matter, even financial security, it's been worthwhile. There are many things in my life I would change, if I could start over. The opportunity to serve my community, whether on a Park Commission or in the United States Senate, is not something I've ever regretted. Hopefully, some sense of my past will now help inform the future.

Yesterday's presentation painted a very different portrait of me and my situation. And I would say to the members of the Committee that you can only accept Mr. Bennett's characterization if you ignore four clear and undisputed historical facts. My personal history includes three decades of public service requiring substantial responsibility and integrity. I lead numerous grass roots organizations. I read both Terry Sanford's books. There may be more, but I remember reading at least two of them. I've idolized people like that. I was an attorney in private practice. I was Executive Secretary to the Governor of Minnesota. I was corporate counsel to a Fortune 500 company.

Secondly, I have a strong background in ethics in government. I was the Vice Chair of the Minnesota Ethical Practices Board and its predecessor, the Minnesota Ethics Commission. I was Executive Director of the Minnesota Constitutional Study Commission and the Minnesota Supreme Court Advisory Committee on Professional Standards for

Judges.

Third, none of the people involved with me in these matters can be described as anything but upstanding. They are well respected members of their communities, they're not fast-buck or special interest operators. Roger Scherer is the President of his family's lumber company, he's President of the Minneapolis Chamber of Commerce, as Jim indicated, he was a former State Representative for many years, and I won't go through the rest of his resume. But they wouldn't have picked him for those jobs if he was a fast buck artist.

Paul Overgaard is the president of an investment company, a former State Senator for 15 years. He was a candidate for Governor in 1982. He was my campaign manager in 1978. And he's my close personal friend. But friends don't do the kinds of things that Special Counsel talked about.

Randy Johnson, County Commissioner in Hennepin County, Gene Holderness, Chief Executive Officer of one of the major national law firms in the Twin Cities area, Tom Horner, a major partner in a public relations firm in Minnesota today, and Doug Kelley, who is running for Governor in Minnesota this year, a former United States District Attorney, and one of the few folks in the world that's been up on Mt. Everest, and a lot of other people. Mike Mahoney, a principal in a major law firm in Minnesota, and I could go on. To me, reprehensible is an appropriate word to characterize the suggestion that these people would participate in the kind of scheme outlined by the Special Counsel.

And, fourth, all of these matters were done in the open and disclosed. There has been no obfuscation or cover up. And I must say, somebody called, yesterday, they were watching my facial expressions or something like that, and when Bob Bennett got to the point of the Piranha Press chewing up the prey, or whatever it was, I guess I got one of those facial expressions that said I was arrogant or something like that, but I must say, every time somebody brings up this notion of Piranha Press, I just to have to say, would anybody in their right mind believe that anybody was going to cook up a scheme to evade U.S. Senate Rules by going out and creating a company called Piranha Press?

(Laughter.)

No. Mr. Bennett's characterization flies in the face of these well known facts. And I'd urge you to take into account these facts as you weigh his conclusions.

Now, I want to turn to several comments which reflect in a more personal way on the facts my counsel has given to you. And, first, let me talk about what has come to be known as the "condo deal."

Those Americans who argue for a citizen legislature can look to me, for better or worse, to see some of the realities that face someone who comes into public office relatively late in life. I was a grass roots activist and what I knew about the mechanics of the Senate came when I was told how much I could spend for my staff, given the keys to my office and my unabridged dictionary, and told, good luck. After the election in November of '78, my family and I stayed in our Minneapolis home until it was sold in February of 1979. We then moved to a home we'd purchased in McLean, Virginia. Each time I went back to Minnesota, I stayed at a Minneapolis hotel until June of 1979, when we bought a small condominium in a downtown Minneapolis condominium building that was just going up.

The condominium is not, contrary to some impressions that have been created, what you'd call lavish. It's not very big, it's about the size of an efficiency apartment. It has a bedroom, a bath, a sitting area, and a kitchen. It's approximately, in fact, the same size as the hotel room that I've been staying in for the last five months, which is just a block away.

Coming from a State that expects much of its public officials and coming into politics late in life, I was committed to spending as much time as possible in Minnesota. And much of that time was spent in and around the Minneapolis St. Paul area. More than half of the people in Minnesota live in the Twin Cities area, and about 70 percent of the people in the State live within an hour's drive of the Twin Cities, making it logical that Minneapolis would be the place where Rudy and I would be spending most of our time.

Personal convenience and privacy were also factors in wanting to have a regular place to stay, rather than continuing to rent a room in a hotel. I was able to leave clothing there, for example, because you can't imagine how many times shirtsleeve weather in Washington turns into overcoat weather in Minnesota. I kept a lot of books and personal files there. I kept a typewriter and paper to write speeches and other material, drawing on the records and the files that I kept in the condominium but I couldn't keep in a hotel.

And I tell you this only because I don't want you to think, as some people do, that this condominium is a palatial home 23 stories above the Twin Cities, or that it's use was devoted to lavish entertainment for me and my family. It's actually one of seven units on the sixth floor of a 23-story building. A quick tour would convince you that it's really not suited for much other than sleeping and working. And it served me as both an office and a place to stay, on those frequent occasions when I was back in Minnesota.

Now, despite all of these advantages and after several years, it became apparent that the condominium in Minneapolis was an expense that I could not afford. By the spring of 1983, my friend and Political Chairman, Gene Holderness, had persuaded me I needed to sell the condo and stay in a hotel or rent, so I could be eligible for Senate reimbursement on my visits back to the Twin Cities. If I didn't have to spend so much time in the Twin Cities on official Senate business, I would not have bought a second home, or rented a condo. Many Senators, as we all know, own two homes. I owned a second home in Minneapolis until I couldn't afford to, and then I rented from a partnership in which I was a part owner.

My counsel, Mr. Hamilton, has discussed in detail how the issue of my lodging was resolved. What remains is to focus on the key questions.

The first one is this, and I guess this is about as plain as I can make it. Should the Senate reimburse a Senator on official business in his home state for the expense of a hotel but not for a nearly identical rental unit if the Senator is part owner?

The second issue in this case is the issue of backdating. Was this Partnership agreement fully in force in July of 1983. Did the subsequent sale of the condo occur in April of 1987, and did I participate in the backdating of any documents.

I'd suggest that the answer to the reimbursement question is simple. The Senate doesn't have a rule that directly applies. I had asked my campaign lawyer, who happened to be a former FEC lawyer, Randy Johnson, to advise me on what Senate rules would permit. His opinion was that I could be reimbursed for stays in a Minneapolis condominium as long as my legal residence was 75 miles away at my parents' home in Avon, Minnesota, which is four miles from Collegeville where I grew up. His opinion was confirmed when a member of my staff asked the Rules Committee and the Ethics Committee about the Partnership situation. No Rules Committee or disbursing office auditor questioned it in the six and a half years I received reimbursement, even though the vouchers I submitted made it clear, every one of them, that I always stayed in the same condominium in Minneapolis.

Now, for the so-called back-dating issue. Originally, I had intended to sell our condo to save the expenses of ownership. On or about July 28th, Roger Scherer and I reached an agreement to combine our condos. The written Partnership agreement was signed at a later time, along with the deeds. It's not unusual, as you know, for there to be a delay between verbal and written agreement. In this case, I didn't push to get the paper work done because my energies were on work, and on some critical personal problems which we've discussed before.

Neither my wife nor I, nor Roger Scherer nor his wife, Erma, participated in the back-dated notarization on the deed by Randy Johnson. He didn't do it in our presence and we didn't even see it until a few months ago. A national accounting firm has advised us that this was a partnership for tax purposes as of July 28, 1983.

The second back-dating issue involves the 1987 sale of the condo to Independent Service Company. Throughout that sale, my personal attorney, Michael Mahoney, contacted me for input on decisions. And I subsequently found out that was an apparent violation of the regulations controlling blind trusts. In June, I began to press Mr. Mahoney to finalize the sale of the condominium. My Chief of Staff, then Doug Kelley, was not satisfied that the effective date of the sale was clear until late in 1987. And that's when rent vouchers for the period from April forward were submitted.

After that, I was the recipient of periodic angry letters, usually left at the condo in the kitchen, from Mr. Overgaard, pressing me to make the trustee, Mr. Mahoney, get all the necessary legal papers filed. You heard one of Mr. Overgaard's confidential letters to me read yesterday by Mr. Bennett. The reason that you have that letter is that it was in my file, kept all of that, and also that I sent, at that time, a copy of that letter to Mr. Mahoney in order to force him, as the trustee, to act, to get the papers out, and to show him, to show him in Paul Overgaard's words, the depth of this man's frustration and his anger, and maybe his imagination.

That didn't get done, the paper work didn't get done to Mr. Overgaard's satisfaction until my Chief of Staff, Bert McKasy, intervened to straighten the deal out in the fall of 1989. However, the intent is clear. Mr. Overgaard made a downpayment, he signed a promissory note, and he paid the expenses on the condominium and I paid rent to ISC as of April 1st.

Now, I realize these matters are complex and, as described in detail by my counsel, they involve many people and many actions over a period of four or five years. But there are several important things to highlight.

First, throughout the formation of the investment partnership and the sale to Mr. Overgaard, I sought independent counsel. Every subsequent decision was made on the basis of legal advice.

Second, I gave instructions to my staff to seek reimbursement only for official Senate business.

Third, the Partnership allowed me to serve my constituents better and more frequently in a way I could afford and as an alternative to comparable, more expensive but reimbursable accommodations. It was not a financial windfall for me.

Fourth, I did not increase the time that I spent in Minnesota in order to collect payments that would increase the Partnership equity. Prior to entering the Partnership, during the time of the Partnership, and since, I've always spent more than 100 days per year in Minnesota. My Senate colleague, Rudy Boschwitz, and we came in this together, spends even more. That's the nature of the way we represent the people of the State of Minnesota.

Fifth, I did not participate in back-dating any notarization of any of these documents at any time. I have to repeat that. I did not participate in back-dating any notarization of documents at any time.

And, finally, despite all of the steps that I took to ensure that expense payments were proper, and despite the fact that over almost six years, no one in the Senate ever questioned my request for reimbursement, and despite the fact that there's no Senate rule on renting from an equity in which I have an interest, I said in December of last year, and I recommit to you, my colleagues, and all the rest of our colleagues, today, to abide by whatever decision my colleagues make, and to return any payments I was not entitled to.

In response to an inquiry I made voluntarily of the Rules Committee in December, you know I returned $11,005 in payments that the Rules Committee determined were not eligible for reimbursement.

And now let me talk about what has been referred to for the last four years as the "book deal." I think, as we all know, many people in public life write books. And I think, as we all know, many people in elected national office have written books for a wide variety of reasons. Normally, these books don't sell as well as the best sellers. The authors don't write them to make money. They write them because they have something they want to say, and because there are people like me that want to read them.

It was in this role as an educator that I wrote my book. The books gave a broader forum to ideas I wanted to contribute to the national agenda. I'm the oldest son of two teachers. I was a journalist and an editor in high school, college, the army, everything I went into I was the writer and the communicator and the educator. I did it as a community activist, as a speaker, as a parent, as a legislator, as a public speaker, and a writer. If you look at Neither Madmen Nor Messiahs, you'll find out that former cabinet secretaries Jim Schlesinger and Jean Kirkpatrick both read the manuscript of Neither Madmen Nor Messiahs in advance and agreed to write forwards for that book. And you've already heard from Jim about the compliments of others.

Once that book was published, promotional events were held in Washington and in Minnesota, organized by Gary Diamond, the publisher. The events generated exposure and extensive news coverage, including favorable comments from national figures and, I must say, a very flattering view in the Minneapolis Star and Tribune. In addition, an agreement with B. Dalton Booksellers was reached to sell the books in Minnesota and in Washington.

It was only after the book's publication that my attorney, Mike Mahoney, presented me with a proposal to create a stipendiary relationship with the publisher. In return for exclusive rights -- and remember now, I kept title to 'Madmen Nor Messiahs; this was a voluntary effort on the part of Diamond. He wanted to publish the book. I retained title to that book, he got to keep the -- well, he was going to give the profits to the Servicemen's Center. But,anyway, the stipendiary relationship was in part premised on the fact that I would convey the exclusive rights to Neither Madmen Nor Messiahs to Mr. Diamond and that I would make appearances to promote the book and the publisher, Piranha Press, and they were to pay me $12,500 per quarter for two years.

Now, the question you are asked to decide is this: was the contract that I subsequently made a legitimate stipendiary contract, or, or was it a scheme to get around the limits on honoraria. Probably not a simple decision for some to make, but I think, on the facts, certainly for me, not hard at all. But I want to suggest a way for you to approach the answer.

First, ask yourselves, is he a writer or is he a politician who's using his books for some devious purpose. And the first part of that answer depends on the books, themselves. I am proud of the books' content. They are thoughtful, original statements on critical national policy issues. They were not designed to make money for me. They were not sold by my staff, they were not vanity books. They sold 3,000 to 5,000 copies and I'm told that's about average for these public policy books.

Is he a good writer? Ask an audience. Prolific? You bet. I write most of all my speeches, the books, op eds, columns, that sort of thing.

Did he intend his book promotion contract to promote book sales or to make him money? And the answer to that is, both. And that's the key.

If I spoke often and well, this fledgling publisher would have the opportunity, the audience and the money to publish and sell more of my works. If I spoke well, I earned at least what several of our other colleagues did who are earning money from stipendiary contracts. I knew about these contracts.

I'm going to object to the characterization, yesterday, of Mr. Diamond. He was characterized almost like, you know, I think Mr. Bennett said all he'd ever done is publish a wrestling book or something like that back in the 70s. That's not Gary Diamond. Mr. Bennett knows that. Gary Diamond's a second or third generation journalist and publisher. His dad was a sports editor of the Star Journal in Minneapolis. Gary's been in journalism since he was a ten-year old copy boy for the old Star Journal in Minneapolis. He was a Marine combat correspondent, he's been a reporter, an editor, an owner of newspapers. He's been in the publishing business since 1947. He happens to be publishing a lot of trade magazines, some independent publications. Every year, he publishes -- talk about books -- he publishes the annual yearbook of the second greatest State Fair in America, the second largest, the greatest State Fair in America, the Minnesota State Fair Yearbook he publishes. So was he a red flag when he came to me and said, I want to publish? Not at all. This man is a publisher, not a red flag.

Were there no red flags to tell me not to do it? Well, consider the facts. In advance of my decision, Mike Mahoney, my attorney, provided me two written opinions and numerous oral assurances supporting his advice. In advance of my decision, the FEC approved the arrangement without any question. We reviewed the arrangement with the Ethics Committee and received oral approval. Almost without exception over many appearances in two years, I was not contacted with complaints or even questions about the format, the sponsorship, or the fee.

I'm glad you asked me to read those affidavits and those statements from the 113 people, because that's how I developed the kind of understanding of this that Mr. Bennett characterized yesterday.

My disclosure statement of May 1986 brought the arrangement to the attention of the news media, including the fact that sponsors were paying my publishers for my appearances. Other than reporters, no one, not the Ethics Committee, not the FEC, raised questions about the contract until political partisans used the issue two years later in my 1988 campaign.

But, Senator, you'll say, didn't that stipendiary relationship strike you as unusual? And I must say, unique, yes; and I said that in the newspaper article; but unusual, no. Not then and not on the basis of what I knew. And here's why.

I was well aware of other senators who were paid stipends in excess of honoraria limits for commonplace activities including radio appearances, college speeches, and I think counsel has provided you with examples. I relied on paid professional counsel, on the FEC, and the Ethics Committee to guide me.

On May 20, 1986, the FEC's assistant press officer, Sharon Schneider, was asked by a reporter about the nature of the promotions. And here's what she said, and I quote from the St. Paul Pioneer Press Dispatch of May 21st. She said, "I don't think that legally changes the fact that he's getting a stipend, which is a fixed amount and not an honoraria. He is performing services for the Company and he has a contract with the publisher."

Also, as testimony in affidavits attest, my staff and I reviewed the procedures with my attorney before and throughout the implementation.

The next question to ask: did the publisher receive anything of value? And, again, the answer is, yes. The publisher hoped to establish himself as publisher of public policy books. His calling cards with other authors was to be my book, Neither Madmen Nor Messiahs or that health book, The Prescription for Change, or the health book that I talked to you about when we met in private and showed you the manuscripts which are about two-thirds done. That's the book that was referred to in one of my comments as the so-called "real" health book.

Mr. Diamond also earned a profit through this arrangement. The only payment to me was the quarterly stipend of $12,500. Perhaps because this was his first foray into book publishing, I was given no direction by him and I was left to my own judgment to promote books, to promote the publisher, or to speak well to promote myself and my ideas to the benefit of my publisher. Mr. Diamond never provided me with specific promotional procedures to use in each speech, although there were specific directions on some of these speeches. Nor, did he ever criticize how I was meeting my contractual obligations. And the hosts of these speeches and the audiences seemed satisfied with my speeches and the arrangements.

Now, what I have told you is what I saw and what I believe. I obviously, and with good reason, thought I was proceeding in manner that was above board and fully consistent with the rules of the Senate. That's what I told Fred Graefe, who was referred to yesterday. That's what I told Mike Bromberg, who was referred to yesterday. That's what I told Bill Cohen in September of 1985, one of our colleagues, author, poet. I told him about the arrangement that had been approved by the FEC and sent him the material. Tad Cochran can tell you, he can remind you that I talked about it at one of our lunches and it stimulated him to go and find out if there was a stipend area opportunity for him, for example, in college speeches, and something like that.

So this was no keep-it-under-the-table, keep-it-away-from-your-colleagues; I had an FEC approval for a very acknowledged, unique stipendiary relationship. And, again, here's the record. I inquired about the deal with the Ethics Committee Staff, and I was informed that the matte was in the jurisdiction of the FEC. I didn't file a formal request for an opinion with the Ethics Committee but I did with the FEC, but Ethics was on notice.

When my own administrative assistant asked the Ethics Committee Staff, in February of 1986, about the contract, they said, if the FEC approved it, it was okay. And the details of that conversation you have in the record.

After full public disclosure and public debate of the propriety and editorial criticism of the contract in May of 1986, I voluntarily decided to cancel it at the end of 1986. That's right; it ended three and a half years ago. The Ethics Committee and the FEC took no action.

Nobody did anything until friends of my political opponent in the 1988 election filed their complaints with this Committee. Those facts clearly indicate that I proceeded with the explicit and implicit approval of authorities.

But, having said all this, having said all that, and having had the opportunity to review the Special Counsel's evidence that he's introduced today, I want to acknowledge the problems in the way in which my books were promoted and sold, and especially the problems of their appearance. Giving speeches to organizations that usually pay honoraria, but in this case, pay sponsor fees to a publisher who pays me a quarterly stipend sure as heck looks like a way of getting around the law limiting honoraria. Take away the assurances, take away the legal opinions, I should have known it and I should have avoided it. And I'm sorry I didn't.

Having spoken now at length in defense of my actions on the two central issues, it could be easy for some to say that Durenberger is still blind to the things that have brought us here today. And I want to say to each of you personally as I will to as many people as I possibly can, that nothing could be further from the truth. While I don't presume on this occasion and in this forum to offer myself as an expert or a guide to my colleagues on the Committee or in the Senate on the subject of political ethics, there are a few personal thoughts that I need to share.

It is with a great deal of sadness that I approach this proceeding and review my own actions which have provoked it. The Senate is an institution I love. I've come to love it. I didn't love it before I got here, didn't even know what the Senate was all about, but I've come to love it. And I hold it in the highest reverence. There's no body like it in the world. There's no body like it in human history, where democratic ideals are so clearly expressed. The Senate is the unique embodiment of two cherished principles: majority rule and minority rights. The Senate is a celebration of both our unity and our diversity as Americans. The men and women who serve in the Senate and who have served here in my eleven years are worthy of the great history and the purposes of this institution.

To the extent my actions, my inactions, my failure to perceive the consequences of my actions, have in any way reflected poorly on the Senate as an institution, or have been uncomfortable or distressful to you, as persons, I must say I am sincerely sorry. I have tried to uphold and to strengthen this institution. I've refrained from the practice of trying to improve my stock by attacking my colleagues or the institutions of government. I've been careful not to abuse my rights or my privileges as a Senator with respect to allowing the Senate to work its will and get its business done, and I think you've observed that. I've tried to avoid rank partisanship and demagoguery. I have been eager to take on difficult committee assignments and tackle complicated issues, like Medicare reform, intelligence oversight, and clean air. I believe I've made a significant contribution to the work product of this institution. I've taken my institutional responsibility very seriously to protect the Senate's structure and ease its operation. And that sense of the value of the institutional responsibility makes my sense of sadness over this situation all the more acute.

As I've said, I was raised in a small town. I think when college was out, it wasn't more than about 200 people. The first 21 years of my life were in this closely knit educational community. Other people's perceptions of what you did weren't much of a factor in that kind of environment since we were all known on a firsthand basis. But those kinds of personal relationships can't exist in the larger public arena. People must, of necessity, rely on others views and impressions. And that's when perception becomes a real factor. Appearances, I have learned, are much more than a tool of public relations in this business. They have ethical consequences far greater than we usually attribute to them.

As Professor Thompson of Harvard testified to the House of Representatives, and I'll quote him, "public officials have an ethical obligation to do all they can to make sure that citizens do not have any reasonable basis for believing that they or their colleagues are violating their own ethics rules. There is an ethical obligation to protect the appearances of propriety almost as great as to produce its reality." What I have learned is simply that a clear conscience or a legal opinion does not make you ethically bulletproof. It's a tough lesson to learn. It's a good lesson, but it's tough to learn it the way I have.

The difficulty for rules driven ethics is that it is difficult to write or to enforce a rule governing appearances. It becomes quite difficult when ethics, like beauty, is in the eye of the beholder. But let there be no misunderstanding of what I'm saying. There's no excuse for my actions to be found in changing public perceptions or in the way other members conduct themselves. I am fully responsible and I am accountable for the mistakes that I have made.

I'm simply pointing out, from my own experience, that the broader challenge of political ethics which we of this body will have to address in campaign finance reform, limitations on honoraria, our associations with non-profit organizations, the proactive work that the Vice Chairman referred to earlier of ethics rules, disbursing, to inform and advise, those, and a host of other issues. Public attitudes about political ethics have changed and we have to change with them, or be swept aside.

There is one area of Senate institutional change which bears mentioning and of which you are especially aware. I needn't remind the six of you, in particular, that the U.S. Senate is no longer the place to which America brings its poor, its tired, its hungry masses to represent people just like them and the rest of the country. The pride of our democracy is still the citizen nature of our legislature. But we've made it awfully difficult for ordinary folks to be represented by folks just like them.

I remember well, Mr. Vice Chair, the day in 1981 just after your election put you and me into the majority in the Senate, and I came to visit and we were sitting in your office and I was admiring the New Hampshire furniture that you'd brought down to Washington as part of your effort to hold down the cost of living for brand new Senators in this very expensive place, and I also recall, at that time you commented on how you were now in the Appropriations Committee and you were on the Defense subcommittee, and now you were in charge of deciding $132 billion national budget.

The point is simply, many of us have had to make accommodations to serve in the United States Senate. And, gentlemen, you know from today's testimony, during a costly period of family life that I was ill prepared for, I had a real financial squeeze. It's not excuse, but I spent a lot of money on lawyers, tax advisers and the like to make sure I could concentrate my full energies on my constituents' needs and the opportunities that a dramatic time of change presented to a United States Senator from a State like Minnesota.

This institution, the Senate, and all of its bureaus and committees and bureaucracies were very little help to a Senator seeking advice on financial matters. This place operated then, at that time, and this is the part that is now beginning to change and I'm so glad that the Vice Chairman mentioned that in his opening statement, at the time I came here, this place operated in a way that placed most of the burden for knowing and complying with rules on the Senator and very little on the institution itself. And I congratulate you all for moving that in a different direction.

In conclusion, members of the Committee and the Senate and especially the people of Minnesota, I want to express again my regret and my sadness for the circumstances that have brought us to this point. I acted throughout in good faith. I sought out competent legal and official advice. I worked too hard on your public agenda to attend to my private one.

Since my service to you began, I have never sold your vote or bartered your influence to enrich myself. But I recognize that real damage has been done by what has been perceived as my desire to push the limits and take advantage of the Senate, and for that, I am deeply sorry.

As my counsel has already stated to you and members of this Committee, we have decided to submit this matter to your judgment at this time on the record of the last 21 months and our presentations. Furthermore, I would ask that, since this material is now in the public domain and I am constrained by both resources and this process in my response, that you make your recommendations to the Senate as soon as possible.

You six alone possess all the facts and the knowledge of the Senate Rules and the standards by which we all interpret them. To leave this much data on the table without your conclusions, the judgment of the Senators works strongly and unfairly to my disadvantage. In addition to the factual evidence, you have worked with Mr. Bennett for over a year. He has a right to his conclusions and to his characterizations. But I hope and I believe that they won't be a substitute for your independent judgment, that it's your personal analysis and your conscience that will lead you to your own conclusion. In the final analysis, I'm asking that each of you come to your own personal conclusions on these matters. Special Counsel had his opportunity, yesterday, and probably will again after I finish speaking. I've had mind in the last hour.

As you weigh this matter, I hope you will consider the whole Dave Durenberger. What I did wrong and what I've done right for this institution. I hope you'll compare that with your own experiences of life in this body. And I trust you'll reach a decision which is both fair and true so that when you go home to Alabama, Arkansas, North Carolina, New Hampshire, Mississippi, and folks say, hey, what about this guy Durenberger, you can put it in the context of your life, as well as mine. My life and my reputation are at stake and I believe, because I know you, that each of you will combine both the good judgment and the compassion in your decision.

Those are my feelings and my motivations, as best as I can express them. And I hope they'll be received in the spirit in which they're offered.

One last thing about me, Dave Durenberger does not run from a challenge. I believe in the fairness of the people of Minnesota, I believe in this institution and the value it places on effectiveness and hard work, and I believe in myself. I believe in myself enough to know there is much I have to contribute to the quality of life and governance in this country.

There's an ancient proverb that says, every blow that doesn't break your back strengthens it. And I must say, I am a stronger, a wiser, a more committed Senator today than I was seven years ago. I'm a better Senator than I was 21 months ago. And I know I certainly have a way to go to convince people of that. In order that that can take place, this process should go forward and the Committee and the Senate render its judgment. I will abide that decision.

And furthermore, I'll state to you today that, when that's done, I intend to serve this body and my home State of Minnesota with a renewed conviction to exemplify the servant in public service. Tolstoy said, every man wants to change the world but only the best wants to change himself. Recognizing what I have put at risk, and strengthened by what I've learned, I am eager to get about doing a better job of meeting that standard. For the mistakes I have made, I repeat, I am sorry, and I'm looking forward to making amends in the only way I know how: by being the best person, the most effective Senator I can be every day I serve in the United States Senate.

Thank you very much.

Chairman Heflin. We'll stand in five-minute recess.

(Recess.)

Chairman Heflin. We will come to order.

Mr. Bennett, do you have rebuttal?

Mr. Bennett. There is one matter that I would like to clarify first, if I may, Senator. I don't know whether that rebuttal now is appropriate or whether Mr. Hamilton wishes me to call the witnesses which we have subpoenaed on the evidence. It's my understanding that he does not wish me to call them, is that correct, Mr. Hamilton?

Mr. Hamilton. That is correct, Mr. Chairman. We are intending to submit on the record that has been developed by

Special Counsel and by us.

Chairman Heflin. Well, that's something that we are still in opening statement and this sort of thing. The submission and that is a matter that the Committee will consider, after the opening statements have been made.

Mr. Bennett. Senator, I would just ask you, there are 32 witnesses who are under subpoena and some of them are in the next room. I would ask, in light of Mr. Hamilton's statement, that we be authorized to release them from their subpoena.

Chairman Heflin. Well, we're following a procedure and I think the Committee is going to have to consider all of this. So I would say, go ahead, finish your opening statement and then, at that time, we will take it under advisement and render some decision. We have an obligation to make a full and complete record for the United States Senate and every member of the United States Senate. And that obligation is before us, so I think we'll go ahead with opening statements and then we will hear the presentation of the submission and determine whether it is a full and complete record that's being made, and we will make determinations pertaining to it at that time.

Mr. Bennett. I'm certainly not disagreeing with the Chair, but the only point I was trying to make is rebuttal opening statement would be one thing if the evidence is closed, and quite a different one. But, Senator, in light of what you say, I will make a few remarks at this time, and we can deal with that matter, later. It'll be about 35 or 40 minutes.

During the break, a member of the Press corps asked me what I thought of the Senator's remarks. And in perhaps the first and only time in the past year that I have commented to the press on Senator Durenberger, I told him I thought it was wonderful. It is very difficult to follow such an eloquent -- and I mean that sincerely, Senator -- and touching comment.

But I feel that integrity to the investigation, fairness to this Committee, and to use a term that is somewhat commonplace in this institution, matters of personal privilege, I feel that a number of remarks are appropriate. There is a big part of me that just wants to say, enough. Here are the books, go read them. Let's all go home. No human being in this room could feel good right now. I sure don't; but let's try to get back to some of the facts.

Mr. Hamilton indicated that he did not participate in the various depositions that were taken. And, of course, you members of the Committee know that we take these depositions in a confidential way because we do that to protect members of the Senate who are under investigation. Mr. Hamilton got copies of all of these depositions way back. He certainly could have deposed these witnesses, himself, and could have submitted their depositions to this Committee.

Mr. Rudman. Mr. Chairman, could I just ask the sound technicians if they could turn off all of the microphones, if they have that capability, except for the microphone being used by counsel.

There, that's fine. Thank you.

Mr. Bennett. About this investigation, I have and I'm sure Mr. Hamilton would confirm, I have asked and I have repeatedly asked any and all evidence and exculpation of the charges. I have asked, please, is there one event that you can point to me where the Senator in fact was asked to promote his books. And as of this very moment, I have not received that evidence.

And as you members of the Committee know, from day one, I have presented to you each and every bit of evidence, whether it was incriminating or whether it was exculpatory. But at a certain point in time, it is my obligation to tell you members of the Committee what the evidence is and what conclusions I draw from it.

The second point that I wish to make is made for the purpose of clarifying the record and it sort of broaches the point of personal privilege. Senator Durenberger is not charged with fraud. I have not charged the Senator or his friends with a sweeping conspiracy. I have not said that Mr. Horner, Mr. Kelley, Mr. Johnson, Mr. Overgaard, or Mr. Diamond have done anything wrong at all.

The conduct of Senator Durenberger is what is issue here, and it is not conduct in the context of a criminal case; it is an ethics case. I said yesterday, and I will repeat again, I found insufficient evidence to suggest that Senator Durenberger was involved in criminal wrongdoing. I have found insufficient evidence of malice, I have found insufficient evidence of specific criminal intent. I said it then, and I will say it now. And so I think it is putting me in a most unfair position to suggest that in order to carry my burden to you today, I have to show that there was some sweeping conspiracy that the Senator was involved in.

But what I have also said is that this conduct was not inadvertent, this conduct was not based on mistake of law or fact, this conduct was not negligent. This Senator knowingly and intentionally, I respectfully submit, committed acts which were unethical. Again, I emphasize, this is a case of ethics; this is not a criminal trial.

And again I say, as a matter of personal privilege, it was not I who brought Mr. Horner, Mr. Kelley, Mr. Johnson, Mr. Mahoney, Mr. Overgaard or Mr. Diamond into this proceeding. It was the Senator and his counsel who did that. It is the Senator who says, I got bad legal advice. It is the Senator who says, when the document was back dated, I wasn't in the room. It is the Senator who says, I relied on my staff. It is the Senator who repeatedly places blame on everyone else, and never once asks, maybe my moral compass was in need of repair.

And there is one fact that goes throughout this case, Senators. Mr. Mahoney is in and Mr. Mahoney is out; Mr. Overgaard is in and Mr. Overgaard is out; but the one constant thread through all of this is Senator Durenberger. Senator Durenberger was involved in the Piranha Press; he was involved in the condominium; he was involved in all of the other allegations before you. Virtually all of these other people only played bits and pieces in this entire transaction and series of transactions.

So I will not, Senator Durenberger, have it placed on my shoulders that I have brought into disrepute the names of these people. This is your defense. These are the people that you involved in real time, and these are the people, that as I hear the evidence, I hear the testimony and I hear the statements, you, sir, are blaming for the situation you are in.

Now it seems almost inappropriate after such a very dramatic and sincerely touching remark for me to go back into the evidence, but I feel it is important in certain respects. Because after we leave here, there is going to be a record, maybe 10 years from today, somebody will be referring to. So let's get back into the record just a little bit.

Let's talk about the famous FEC opinion that the Senator talks about, and that is Exhibit No. 254. And in relevant part, here is what Mr. Mahoney asked and told the Federal Election Commission. "Under the author-publisher agreement, Senator Durenberger has conveyed certain rights and work to the publisher and has agreed to make over a two-year period a specified number of promotional appearances for purposes of promoting the book and the publisher at such times and places as may be agreed upon between the author and the publisher."

And this is what they said in return, as it says in Exhibit No. 256: "According to your request, under the author-publisher agreement Senator Durenberger has conveyed to the publisher certain rights in the book and has also agreed to make a specified number of promotional appearances over a two-year period to promote both the book and the publisher. As compensation for the rights in the book transferred by Senator Durenberger and for the personal services to be rendered by him to promote the book and the publisher, the Senator will be paid an agreed-to sum in quarterly installments over a two-year period, as well as a royalty based on the net proceeds from the sale of the book."

Now there is only one factual problem here. The Senator didn't do that. I have not, Senators, criticized these books. I have not criticized these publishers. You know, we would not be here today if Senator Durenberger took these two books and took this opinion from the FEC and set up a group of book promotion speeches, or if Piranha Press set up a bunch of speeches where he could go in and promote his book. We have all been to book promotions. We wouldn't be here today.

This case is a fact case. The problem with this case is there were not book promotions. Now the Senator, with all due respect, can blame his lawyers and he can blame his staff and he can blame everybody else, but it was Senator Durenberger who knew that when he went and spoke to a health care group and didn't even have the health care book out and didn't even have the defense book with him, that this was not a book promotion.

I simply refer you, Senators, to what I think are Exhibit Nos. 10 through 89, which are the affidavits of people, his friends and his supporters, not partisan complainants who said he is a wonderful guy, he is a wonderful Senator, we wanted him to come. But I've got to tell you, and I am obviously paraphrasing, these weren't book promotions.

So let's keep an eye on the ball here. Had they been book promotions, we would not be here. Mr. Hamilton says that the FEC is wrong because the FEC should have come after Senator Durenberger for more information.

Well, first of all, as a matter of law we all know that the burden is on the person requesting a Federal regulatory agency to provide all relevant facts in order to get an appropriate opinion. But how on earth is the Federal Election Commission--were they supposed to guess that there really wasn't a good-faith agreement? Were they supposed to guess that there weren't going to be book promotions? Are you telling me that when a United States Senator through his staff tells a regulatory agency that I have a book publishing agreement and I am going to be giving book promotions, are you telling me, Senators, that there is a burden on that regulatory agency to second-guess that United States Senator?

Next, the Senate Ethics Committee is blamed because some phone calls were made to staff. We are told that Mr. Canfield was called and Mr. Lee was called, and Mr. Abney was called. I don't dispute that they were called, but that is not the point. What was said to them? Did somebody pick up the phone and say we have an opinion from the Federal Election Commission and they said, the Senator has a good publishing agreement which, by the way, was never sent to the Federal Election Commission. They never had this document which our expert, Mr. Vaughan, said was an extraordinary book publishing agreement. This was never even sent to them.

Did these staff people receive a call and say, look, we have got an opinion from the Federal Election Commission? Or if we get one from the Federal Election Commission, is it okay? I suppose some staffer might very well have said, yes. But were they given the facts? They weren't given the facts, and I am not going to waste a lot of your time. Look at Exhibit No. 450, the affidavit of Mr. Canfield. They weren't given the facts. Look at Exhibit No. 48, the affidavit of Mr. Clendon Lee. He wasn't given the facts. Let me read from the affidavit of Mr. Wilson Abney. Mr. Abney is employed as the Staff Director and the Chief Counsel of your Committee. I have learned during the past year that he is a superb lawyer, and I am sure that Mr. Hamilton who knows him well would agree.

He is a man whose integrity is absolutely beyond reproach. I am going to read his entire affidavit to you. Why? This was executed on June 12th, 1990, and why?

Because the day before we received an affidavit from Lori Krage whom I will get to in a moment.

He says that she spoke to Mr. Abney. Now we have interviewed Ms. Krage. She doesn't really remember who she spoke to or what she said. And Mr. Hamilton has her witness memorandum.

"Affidavit of Mr. Abney." Paragraph 4, and I will skip the preliminaries:

"4. While I have no recollection of the conversation referred to in Ms. Krage's affidavit, I would not have advised her that the Senator could receive such reimbursements. I have recently reviewed the logs of telephone calls received by Committee counsel. I am not certain that these logs reflect each and every telephone inquiry received in the office. However, these logs do not reflect any telephone inquiries by Ms. Krage during the time frame in question.

"5. Until the allegations pertaining to Senator Durenberger appeared in the press, I had no knowledge that any Member was receiving reimbursement from the Senate for stays at property in which they had an ownership interest, nor had I ever heard any suggestion that a Member could receive such reimbursement.

"6. I have recently reviewed the documents relating to the Senator's Minneapolis condominium and can categorically state that no one ever informed me about the fact pattern reflected in those documents. Had anyone presented those facts to me and asked me my opinion of the propriety of the Senator receiving Senate reimbursement for staying in the condo, I would have told them that I believed that the receipt of such payments would be improper.

"7. I do, however, remember in 1985 a conversation, or '86 a conversation with a woman who stated that she represented an organization which had been asked to pay $5000 to a publisher as a fee for a Senator's appearance. She would not tell me that Senator's name. I further asked her to tell the Senator that if he intended to pursue the described arrangement, he should contact the Ethics Committee immediately so that all of the facts could be presented for the Committee to rule upon."

Now in fairness we do not know if that was Senator Durenberger.

"8. Having reviewed the documents related to the Piranha Press agreement, I can categorically state that no one discussed with me the fact pattern presented in those documents. If I had been asked my opinion on the propriety of a Member receiving income through such an arrangement, I would have advised that the arrangement should not be undertaken because it would be an improper evasion of the statutory limits on honoraria."

Now Mr. Hamilton realizes, because he is a very fine lawyer, on reading those affidavits that these simply were not book promotions. So he comes up with an alternative argument and he says we didn't really need an opinion from the Federal Election Commission because the Senator had a continuing services contract with Piranha Press.

Well, Members of this Committee, continuing services to do what? Mr. Hamilton tells us that there are certain Senators who give inspirational talks, and other Senators who write articles and go on radio shows. I am not about to discuss personal abuse of those sorts of things. But had Senator Durenberger done those things under a legitimate contract, we wouldn't be here. And if you accept Mr. Hamilton's argument, I will tell you as lawyer to this Committee that before the end of the day you should each go out to some speakers bureau and sign a contract and if, in the words of Senator Durenberger, you speak well, that is pursuant to a continuing services agreement.

Gentlemen, you can get paid for the speeches you make in the Well of the United States Senate if you accept his continuing services argument. If you look good and you speak well and you come across somebody like Mr. Diamond, and he gives you the kind of contract he gives, you will all be in fat city. But you will also be evading the honoraria limitations which you, Members of the Senate, put in effect.

Let's talk about Ms. Krage--and I am not suggesting Ms. Krage did anything improper. Ms. Krage was a staffer who is a follower, not a leader. Put into context, it is the March 21, 1984, memorandum. Let me refresh your recollection. I pointed out to you yesterday that this Exhibit No. 324 had within it a very interesting comment, and it dealt with the condominium and here is what it said:

"She will begin to issue the monthly invoices for your stays in the condo. The name of the partnership will be 703/603 Partnership. That name will be reflected on the invoices. I didn't think it looked good to have "Durenberger/Scherer Partnership on the invoices that were being submitted to the Senate."

I then made the point that next to the word "partnership" were the words "association," and I indicated that it was our understanding based on our investigation that those were Senator Durenberger's initials.

Now the only reason I mentioned that was I wanted to show and present evidence that the Senator received the memo in which that language appeared, "that it didn't look good to have his name" affiliated on what was submitted to the Senate. If Senator Durenberger says, as he has through counsel, that those are not his initials, then I do not question the gentleman's word. But the point is that the memo was sent to the Senator, and the point is that Mr.

Hamilton's response to me proves my point. He said, well, he didn't write the association, but he did write all of the other notes on the memorandum.

My point--and that is my point--is the Senator received this memorandum. Now what is also significant is Mr. Hamilton says I cannot consider the March 21 memo without considering the earlier memo. Let me ask you this question. Lori Krage is the lady who supposedly had all of these conversations with the staffers on the Ethics Committee. If there was all of this disclosure to members of the staff, and if everybody had this full deck of cards, why do we have the entry that the name of the partnership will be 703/603 Partnership, and that name will be reflected on the invoices? "I didn't think it looked good to have Durenberger-Scherer Partnership on the invoices."

Why is that? Exhibit No. 452, which rebuttal Exhibit No. 452 is the deposition of Mr. Mahoney taken in April of 1990, and here are the questions:

"Q Are you aware at some point that the name was changed to 703/603 Association?

"A Yes.

"Q Why was that done?

"A I don't know why. David Steingart informed me that it had been changed I think sometime in May or June or July, sometime much later, and that had been done at the request of the Senator. My recollection of that conversation is that it had been a request of the Senator, but I am not sure of all of the reasons why.

"Q Are you sure of any of the reasons why?

"A No, I am not.

"Q Do you have any understanding of any of the reasons why the name was changed?

"A No. I remember a conversation in which David Steingart told me that the Senator wanted the name changed to the 603/703, or whatever it ultimately became, Association."

This is not a Senator who was just not involving himself in the details of matters. Let me not repeat the evidence I repeated yesterday, but let me just mention one minor thing and then I think something pretty important.

I didn't mention in my opening the business about the capital grounds. That is all spelled out in the materials, all of the lies there, but that is not why we are here. We are not here because a speech was given in the capital grounds. I believe our analysis of the law is correct, but I will tell you something. If Mr. Hamilton is right and I am wrong, you better change it, because if the Piranha Presses of the world can come into these Hallowed Halls and make a couple hundred thousand dollars a year, something is wrong. So I believe that you have provided for that and have prohibited that.

But if I am wrong and he is right, I suggest that you do something about it. And another foray at the capillaries, instead of what is really here, we hear about this blind trust. I am not going to say anything more about the blind trust, because I spell it out in the exhibits, but I will tell you this: This was a blind trust with absolutely perfect hindsight. The Senator--the Senator lived in the condo. He discussed the condo repeatedly. And in the exhibits, as I mentioned yesterday, there was all of this effort to find out how many times he had to stay in order to pay the cost. This blind trust had absolutely hindsight.

Now what is important, and most important, and my final point is this--and as a matter of personal privilege, I say to Senator Durenberger, I meant what I said about your statement. I do not feel good. I feel bad, very bad. And to the extent that I have added to the personal pain in your life, I as a human being am very sorry for that.

But my responsibilities, like your responsibilities, are different. Every day across this country people without power, without the ability to be eloquent, without influence, are held accountable to the laws that you pass. And if this country means one thing, it means that nobody is above that, including, as great a Senator as Senator David Durenberger.

I remind you that your obligations are not to him. Your obligations are to this great institution, and to the great People it serves.

Thank you.

Chairman Heflin. We will stand in recess now until 1:45.

(Whereupon, at 12:07 p.m., the hearing was recessed, to reconvene at 1:45 p.m., this same day.)

AFTERNOON SESSION

(2:30 p.m.)

Chairman Heflin. We have a quorum present. We have one Member who is unavoidably detained, but we can proceed.

Mr. Hamilton, you had a motion that you wanted to make before the Committee. If you would, proceed with that.

Mr. Hamilton. Mr. Chairman, I wanted to move into evidence the 112 exhibits that we have previously submitted to this Committee.

Chairman Heflin. All right. Now of course in the normal course of events the counsel for the Committee has the burden of proof, and he submits this. Now you are submitting it.

Special counsel, is it agreeable with you that he proceed with this motion at this time?

Mr. Bennett. Yes. I have no objection to Mr. Hamilton's motion being granted.

Chairman Heflin. You are moving to have your exhibits. Now do I from what was said previously, is it your intention that when you move those that you do not intend to call live witnesses?

Mr. Hamilton. That is my intention, Mr. Chairman.

Chairman Heflin. All right. Now of course under the Rules, the accused, if that is a proper term, or the Senator can waive an adjudicatory hearing if he wants to. Of course we have started it.

Now in regards to doing this, do you expect Mr. Bennett to call witnesses? Or what do you want to do pertaining to that? It is a little unusual and different, so I want to explore exactly what you--

Mr. Hamilton. Mr. Chairman, my understanding or expectation is that Mr. Bennett will submit his 450 exhibits and we will submit our 112 exhibits, and on the basis of this record and of course the statements that have been made to the Committee, that the Committee will then make its decision.

Chairman Heflin. All right, sir, now in doing that if the Committee agrees to this--which we will retire after you've made your motion to discuss it and then vote on it--do I understand you that in doing this that you would therefore waive any rights that Senator Durenberger has under the Rules that might be contravened by such a procedure?

Mr. Hamilton. Yes. You mean, you're talking about the rights to call witnesses, and to cross-examine? The answer to that is, yes, Mr. Chairman.

Chairman Heflin. Well that includes of course the rights under the Rules or any aspect of it. It would include the right to confrontation, which is probably more of a criminal case, but just for the sake of that; the right to cross-examine witnesses; to call witnesses; and any other due process right that Senator Durenberger might have.

Mr. Hamilton. That is correct, Mr. Chairman. We would waive that.

Chairman Heflin. Now, Mr. Bennett, what is your position on doing this?

Mr. Bennett. I think it is Senator Durenberger's call, Mr. Chairman, so I would be in agreement with that, with the proviso that at a certain point I will be able to address the Chair about the admission of the evidence.

Chairman Heflin. All right. Now, Mr. Bennett, if this is done will a full and complete record be made to submit--of this case--to be submitted to the Senate?

Mr. Bennett. Once my evidence is formally received, I believe that there will be a very complete record on which this Committee can make its recommendation to the Full Senate, provided of course that I have to also comply with the Rules and submit to this Committee a final report.

Chairman Heflin. Well, of course this Committee received the exhibits on the weekend, I believe, when we were distributed them, and that is--that is, the exhibits from Senator Durenberger, and obviously as many as they are the Committee has not had an opportunity to review all of those. You have.

Now is there any rebuttal or any aspect of that that you would want to make?

Mr. Bennett. I don't think so, Senator. I think my record, once this evidence is in, will be very complete. Quite obviously in my final report to the Committee, pursuant to the Rules, it will be appropriate for me to comment on the evidence that is submitted. That record will be complete, Senator.

Chairman Heflin. Well, Mr. Bennett, in regards to the Rules, does this violate any provision of the Rules? Can this be done?

Mr. Bennett. This is perfectly consistent with the Rules, Senator. The purpose of the adjudicatory hearing, which is part of the process, is to give Senator Durenberger an opportunity to confront the evidence presented by Special Counsel and, if he feels it appropriate, to cross-examine witnesses. If the Senator, along with his very able counsel, chooses to waive those rights, it is perfectly proper for the Committee to accept that, and I would suggest to the Committee that it do so.

Chairman Heflin. All right, now, Mr. Hamilton, in order to see that all rights are protected here, I want you to understand that the Committee has made no determination. The Special Counsel has recommended a certain sanction. That does not preclude the Committee from voting any sanction, including--in its recommendation, including expulsion. Now I just want you to--I don't know what the Committee may do one way or the other when this comes up, but in regards to it, you I gather are waiving all rights in regards to this pertaining to any hearing or any due process or any rights under the Rules?

Mr. Hamilton. We are certainly waiving the right for a further hearing, Mr. Chairman. We think the matter should be submitted on the record. We realize the Committee will make a decision on the record.

Chairman Heflin. Now do you want, either one of you, want any additional time after referring to these Rules by which we would adjourn and then at a later date have an adjourned hearing? Do either one of you want that?

Mr. Hamilton. Mr. Chairman, I do not want a further hearing. I think we have covered what we had to say.

Chairman Heflin. Now there is an issue that arises in my mind. Are the proceedings where Senator Durenberger appeared before the Committee and was cross-examined at that particular time, will that be made a part of the hearing here?

Mr. Bennett. My understanding, pursuant to the Rules, is that that was--the Senator had a right to appear before the Committee in closed session and, absent a ruling by the Committee to release that information, it would not be made a part of the public record.

This Committee would certainly have the power and the authority, I believe, to release that information; but absent a ruling of this Committee, a Senator has a right to appear in a confidential proceeding, but that certainly is not a part of the exhibits that I am going to be introducing today.

Chairman Heflin. Do you have any objection to those appearances or statements by Senator Durenberger and the cross-examination that occurred in the Committee being made a part of the record?

Mr. Hamilton. Senator, I think I would like to leave it this way. I was not of the understanding that that was part of the record. I was of the understanding that what was part of the record was the exhibits that Mr. Bennett had submitted and that we had submitted. If the Committee decides at some time that it wants to release some of that information, I would appreciate the Committee's telling me and then I could provide you my views on it.

Chairman Heflin. Well, I was trying to seek a way to do it. Your defense of good faith, the defense of intent, the defense of reliance on counsel were addressed at those. They have not been addressed in this hearing thus far by any evidence. Now I am seeking a way to try to accommodate what you do, but--

Mr. Hamilton. Mr. Chairman, if I may interrupt, I believe that the affidavits that we have submitted go very directly to reliance on counsel and good faith. That is the purpose of those affidavits.

Chairman Heflin. Well of course intent is an issue too that is before us. I do not know, we--you know--do you have any objections to Senator Durenberger being called as a witness and appearing and testifying here and being cross-examined now?

Mr. Hamilton. Mr. Chairman, our position is that we can submit on the record as it now stands.

Is there any--

Vice Chairman Rudman. Mr. Chairman?

Chairman Heflin. Yes.

Vice Chairman Rudman. Mr. Chairman, I would just make one comment. That is, that the state of this record is very complete. Had Mr. Bennett, and I expect had Mr. Hamilton, called witnesses, the chances are--I can speak I am sure for Special Counsel because I have read all of those exhibits, but only some of Mr. Hamilton's exhibits, but I will read them all because they just came in--but I expect that the witnesses would have been the very same witnesses from whom we now have either depositions or affidavits. Am I correct, Mr. Bennett?

Mr. Bennett. That is correct, Senator.

Vice Chairman Rudman. Am I correct in your case, Mr.

Hamilton?

Mr. Hamilton. That is correct, Senator Rudman.

Vice Chairman Rudman. And it is reasonable to believe, as in most cases, civil, criminal, and otherwise, that the testimony of witnesses generally is pretty consistent with their affidavits and with their depositions. As a matter of fact, I dare say, without commenting on any facts, that this case largely has never had a lot of disagreement from the very beginning about the facts. It has had a great deal of disagreement depending on the point of view of counsel as to what those facts mean, and I expect that is one of the reasons why Mr. Hamilton, in addition to the reasons he has stated, has decided to submit it on the record.

So I think it is fair to say, Mr. Chairman, that with the 21, 22, or 23 volumes that we have of statements, depositions, affidavits, plus Mr. Hamilton's submissions, we do have a pretty complete record for the Senate. I would hope that each and every Senator would read the entire record. I would doubt that they could do that. That is why what we will submit to them has to be so well done by counsel and also by Mr. Hamilton, which I will address at a later moment.

Chairman Heflin. Is there anything else either one of you want to say in regards to this?

Mr. Bennett. No.

Chairman Heflin. We will retire right now.

(Recess.)

Chairman Heflin. The hearing will come to order.

Senator Durenberger, you have heard your counsel make a statement waiving certain of your rights. Do you concur in the waiver of all of those rights, including your right to testify here as a witness pertaining to the issues in this trial?

Senator Durenberger. I do, Mr. Chairman.

Chairman Heflin. All right.

All right, then, I would proceed that the submission of evidence will be done by Special Counsel first.

Mr. Bennett. Senator, I would move into evidence in this proceeding Volumes 1 through 23, which are to my right. They are also reproduced by the Government Printing Office in four parts. They cover Exhibit Nos. 1 through 447. In addition, I would move into evidence of this proceeding Exhibit Nos. 448, 449, which are the Senator's books, and I would move into evidence the rebuttal exhibits, the exhibits I mentioned in my rebuttal, Exhibit Nos. 450, 451, and 452. I ask that these, as well as the exhibits moved in by Mr. Hamilton, be made a part of this proceeding.

Chairman Heflin. All right. Without objection, so ordered.

(The documents designated

Special Counsel Exhibit Nos. 1 through 452 were marked for identification and received in evidence.)

(The documents designated Durenberger Exhibit Nos. 1 through 112 were marked for identification and received in evidence.)

Mr. Bennett. There is just one final matter. I have under subpoena 32 witnesses who are under Committee subpoena. I ask that those witnesses be excused from that subpoena. I would ask if some member of the staff could advise those witnesses who are in the other room, to tell them that they can be released.

Chairman Heflin. Do you have anything that you wish to submit or state?

Mr. Hamilton. Mr. Chairman, I believe I have already moved into evidence our 112 exhibits. I would like to make one request. These were exhibits that were submitted to Special Counsel and we have not released these exhibits. It appears that Special Counsel's exhibits have been, or shortly will be released. I believe they are sitting on the table out there. I think it is only fair that our exhibits be released today, too, because there are going to be members of the press, particularly in Minnesota, that will be interested in those documents.

Chairman Heflin. Well I had instructed that there be no release of any documents or things until he had presented them into evidence. So whatever is required to have the simultaneous release of it, we will do. How long will you need in order to submit yours where the press can see it?

Mr. Hamilton. Well we have submitted several copies to the Committee. I would suggest that perhaps the best way to do this is just to put those copies on the table and let the press look at them this afternoon.

Chairman Heflin. All right, sir. Is there any time frame that you want that done in?

Mr. Hamilton. I think the same time that Mr. Bennett's exhibits are.

Chairman Heflin. All right. Well then you will coordinate that.

Mr. Hamilton. I will, yes.

Chairman Heflin. Then you do not request the Chair to make any ruling on a time?

Mr. Hamilton. That is correct. Mr. Bennett and I will coordinate that. That will be fine.

Chairman Heflin. Now do you--

Mr. Hamilton. I have one other matter, too, in line with what Mr. Bennett just said. The Committee at my request put a number of witnesses, some 25, under subponena. I would like to have those released, too. I think even though they are my witnesses, I do not have the authority to release them from a Committee subpoena.

Mr. Bennett. I agree with that, Senator.

Chairman Heflin. All right. Do you have a motion?

Vice Chairman Rudman. I take it, Mr. Chairman, that you have ruled that the subpoenaed witnesses can be released?

Chairman Heflin. Yes.

(All subpoenaed witness for both the Committee and for Senator Durenberger were released.)

Vice Chairman Rudman. Mr. Chairman, before I make a motion, I just want to confer with the Chairman, really, aloud and the Committee. Special Counsel, under our rules, has an obligation to submit a final report to the Committee at the conclusion of this hearing. I assume that will be done expeditiously without a particular time set. Am I correct, counsel?

Mr. Bennett. That is correct, Senator.

Vice Chairman Rudman. Now I also assume, Mr. Chairman, that Mr. Hamilton ought to have the right to submit such brief or final argument, including his view of sanctions and so forth, to the Committee also within an expeditious period of time. Am I correct, Mr. Chairman, that they will both submit, if they wish? He must submit, and he may, if he wishes.

Chairman Heflin. All right. The time frame has not been established relative to that. Do you want to put a time frame on it?

Mr. Bennett. Within a few weeks, Senator. I am going to shoot for two, but I may take a few more days than that.

Chairman Heflin. Well, in the normal course of events in a court, which we are not necessarily following that procedure, you submit, and you give him a copy, and then he replies, and then you have an opportunity to reply under this. Now whether this is different from that--Senator Rudman, what would your thought be?

Vice Chairman Rudman. Mr. Chairman, I understand that and the Chairman is absolutely correct. But in this particular case, as a statutory regulatory requirement on counsel, we ought to just comply. I just think informally Mr. Hamilton should submit. I don't think they ought to be exchanged because that is not the nature of what our regulation calls for. I am quite sure that the issues will be joined by competent counsel without them being exchanged, so I would just hope that we can do it in a two-week time frame without putting that in any order form, Mr. Chairman.

Mr. Hamilton, although not having a right under the regulations, certainly under any doctrine of fairness ought to have a right to submit, as well.

Mr. Hamilton. Thank you very much, Senator Rudman. My one request to Senator Heflin would be that this matter be concluded just as expeditiously as possible. If we can make it, if we can have this done in a period of time that is shorter than two weeks, that would be our strong preference.

We may submit--as you know, we have already submitted a fairly comprehensive briefing to this Committee, and we may submit to do something else. I will advise you about that.

Vice Chairman Rudman. Mr. Chairman?

Chairman Heflin. Senator Rudman.

Mr. Bennett. Let me make just one observation. I don't want to be pushed into doing something faster than I feel I can do the proper and appropriate job. If what is done by this Committee is what was done in the Senator Harrison Williams case of which I was counsel, the report to the Committee was essentially adopted as a Report to the Full Senate. The Committee wrote a very brief report and attached as an exhibit my Full Report. I think it is to the interest of this Committee, and it is very important to me and my staff, that it be done properly.

I will do everything possible to do it within two weeks, but I ask you, please, do not order that to be the case. I will do the best job I can as quickly as I can, but this is too important for this Committee and too important for Senator Durenberger to not do it correctly.

Vice Chairman Rudman. Mr. Chairman, I would just observe that the chances are that if and when this matter gets before the United States Senate, rather than the 20-some-odd volumes of exhibits that will be read, although some will be referred to, it will be the reports of the counsel and Mr. Hamilton's final argument to the Committee that will receive the greatest attention from the Members.

So I would urge that it be moved along expeditiously, but I would agree with counsel that he ought not to rush it and produce an imperfect product.

Mr. Chairman, I have a motion to make, if it is appropriate at this time.

Chairman Heflin. All right, sir.

Vice Chairman Rudman. Mr. Chairman, I move that this Committee accept the submission of this case based on the record submitted by Special Counsel and counsel for Senator Durenberger.

Chairman Heflin. All right, now before proceeding to that, do you waive the right for an oral closing argument on either side pertaining to it?

Mr. Hamilton. I certainly do, Mr. Chairman.

Mr. Bennett. I will stand by the statements I have made yesterday and today.

Chairman Heflin. All right. All those in favor of that motion, let it be known by saying aye.

(Chorus of ayes.)

Chairman Heflin. Nay?

(No response.)

Chairman Heflin. The ayes appear to have it. The ayes have it.

All right. It will be submitted on the record. Is there any further business that either party wishes to raise on this?

(No response.)

Chairman Heflin. If not, then the hearing is adjourned.

(Whereupon, at 3:05 p.m., June 13, 1990, the hearing was adjourned.)